Reports of cases
In The
High court of
Chancery
Vol. 12
1806

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LORD ERSKINE, - - - -	LORD CHANCELLOR.
SIR WILLIAM GRANT, - -	MASTER OF THE ROLLS.
SIR ARTHUR PIGGOTT, - -	ATTORNEY-GENERAL.
SIR SAMUEL ROMILLY, - -	SOLICITOR-GENERAL.

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CASES

IN

CHANCERY, &c.

THE SITTINGS AFTER HILARY TERM,
46 GEO 3 1806.

UPON the 7th of *February* 1806, on the resignation of Lord *Ellon*, his Majesty delivered the Great Seal to the Honourable *Thomas Erskine*, as Lord Chancellor of *Great Britain* who was created a Peer of the united kingdom of *Great Britain* and *Ireland* by the title of Baron *Erskine* of *Restormel Castle* in the county of *Cornwall*, and was sworn a member of his Majesty's most honourable Privy Council.

Mr Piggott succeeded the Honourable *Spencer Perceval* as Attorney-General, and was knighted.

Mr Romilly succeeded Sir *Vicary Gibbs* as Solicitor-General, and was knighted.

Mr. Adam succeeded Lord *Erskine* as Chancellor to his Royal Highness the Prince of *Wales*.

Mr Garrow succeeded *Mr. Adam* as Attorney General to his Royal Highness the Prince of *Wales*.

Mr. Jarvis was appointed one of his Majesty's Counsel.

In Easter Term, Serjeant *Lens*, and Serjeant *Best*, were appointed his Majesty's Serjeants at Law, *Mr. Hargrave* was appointed one of his Majesty's Counsel, and *Mr. Dampier* was called within the Bar by Privilege.

1806

FRANCKLYN *v.* COLHOUN.

February 11, 12.

The MASTER *of the* ROLLS *for the Lord* CHANCELLOR.

Where a party is avoiding service, and the Clerk in Court is dead, the proper course is to move, that service of a subpœna to name a Clerk in Court on the Solicitor may be good service.

[3]

MR COOKE, for the Plaintiff, moved, that service of an order to pay into Court a sum of money upon the Clerk in Court, who had succeeded the deceased Clerk in Court for the Defendant *Colhoun*, may be good service.

The Affidavit, in support of the motion, stated, that the Defendant *Colhoun* is, and has been for some time past, absent from this kingdom; and that the said Defendant sometimes comes to this country, but has no certain place of residence; and his stay is but of short duration; and he conceals his place of residence during those intervals of his stay in this country; that the Clerk in Court for the Defendant in this cause is lately dead; and no other person has been since appointed by the Defendant as his Clerk in Court in this cause.

The MASTER *of the* ROLLS.—It is impossible that service upon a Clerk in Court, who was never authorized by the Defendant to act for him, can do. The regular course, I apprehend, is to serve a subpœna to appoint a Clerk in Court; and I have found in a manuscript collection, a case, pointing out the proper course *Shillabar v. Langdon*. (*a*)

The motion was accordingly varied by praying, that service of a subpœna to name a new Clerk in Court, on the Defendant's Solicitor, may be deemed good service, and the order was made. (*b*)

(*a*) *Shillabar v. Langdon* February 1, 1770. R. B. 1769. B. 214. *Mr. John Watson*, Clerk in Court, had appeared for the Defendant, and filed his answer. At the hearing the Defendant made default, and a decree *Nisi* was pronounced. *Mr.* had some time before the hearing and, no other Clerk in Court being appointed for the Defendant, the Plaintiff sued out a subpœna to name an Attorney and obtained an order, that service of this subpœna on *Mr. John Williams*, the Defendant's Solicitor, should be good service on the Defendant. This order and subpœna being accordingly served on *Williams*, and no Attorney being named, the Plaintiff caused a fresh inquiry to be made for the Defendant at his last place of abode, and also of his Solicitor, and, not finding him, produced proper affidavits of this fresh inquiry, and now prayed, that service of a subpœna to show cause against the decree on the said *Mr. Williams*, his Solicitor, might be good service on the Defendant, which, upon reading the affidavits, was ordered.

(*b*) *Ratcliff v. Roper*, 1 *P. Will.* 420.

1806.

ANONYMOUS.

The MASTER *of the* ROLLS *for the Lord* CHANCELLOR. *February* 12.

Though this Court will appoint a receiver upon misconduct of the executor, it will not upon the single ground, that he is in mean circumstances.

A MOTION was made before answer, that a receiver should be appointed upon the single ground, that a woman, appointed executrix with her infant child, of the age of 6 months only, had no other property than an annuity of 20*l.* given to her by the testator. He had also appointed another person to be trustee.

Mr. Bell, in support of the Motion.

The old rule, that the Court will not interfere with an executor by appointing a receiver, has been properly overruled. In several instances the Court has interfered, to prevent an executor from getting the assets under particular circumstances. *Taylor* v. *Allen.* (*a*) In *Palmer* v. *Price* an application was made for a receiver, pending a suit to recal probate, and set aside the will, on the ground of unsound mind. The testator had been a freeman of *London:* the Plaintiff was his brother; and the Defendant, the widow, was executrix; and was by the Statute (*b*) and custom entitled to a considerable share: yet Lord *Rosslyn* before answer and without notice to the other party appointed a receiver. In *Knight* v. *Duplessis* (*c*) the doubt was, whether in that case this Court would interfere; as an administrator *pendente lite* might be appointed. But in this instance no relief can be had, but in this Court. In *Jenkinson* v. ——— Lord *Eldon* held the old rule exploded.

The Solicitor-General opposed the motion. [5]

The MASTER *of the* ROLLS.—In *Taylor* v. *Allen* the special ground was, that the husband was out of the jurisdiction. There is no doubt, that in several instances, as, if the executor has wasted the effects, or in other respects misconducted himself, this Court will interfere: but has the Court ever taken the disposition out of the hands of the executor on account of his mean circumstances; for it comes to that, You must prove the unfitness of the person. In this case the only ground is, that she is not a person of property.

For the Motion.—Suppose the executor was insolvent.

The MASTER *of the* ROLLS.—The allegation goes no further than that this excutrix is in mean circumstances. If

(*a*) 2 *Atk.* 213. (*b*) *Stat.* 22 & 23, *Ch.* 2. *c.* 10. 29 *Ch.* 2. *c.* 3.
(*c*) 1 *Ves.* 324.

1806. any misconduct, waste, or improper disposition of the assets, were shown, the Court would instantly interfere: but at present no case is made for a receiver.

ANONYMOUS.

[6]

February 12

WEST v. VINCENT

The MASTER *of the* ROLLS *for the Lord* CHANCELLOR.

A person, who opened biddings, not being the purchaser, allowed his expenses on the circumstances, against the general rule, having interposed at the instance, and for the benefit of the family.

A MOTION was made, that a person, who had opened biddings, in consequence of which the estate was sold to another at a considerable advance, may be allowed his expenses, as well as receive his deposit; having stepped forwards at the instance of the family: the first sale under a creditor's bill, being at a great undervalue.

Mr. Hart, in support of the Motion, said, this was exactly the case of exception to the general rule, like *Green* v *Foulkes*. (*a*)

Mr. Johnson for all parties in the Cause, admitted the fact; and made no opposition

The order was made.

(*a*) *Ante*, vol. ix. 348.

Feb. 24, 25.

Ex parte MORGAN

Assignee in Bankruptcy, having purchased an estate of the Bankrupt's under the Commission, held a trustee of the profit upon a re-sale, (1) in the first instance for an equitable mortgagee by possession of the deeds, who, having delivered them up on receiving the produce of the first sale, was held under the circumstances not to have lost his lien for the deficiency.

THE petition stated, that upon the 1st of *December* 1803 a Commission of Bankruptcy issued against *Hart Nobb*. At the date of the Bankruptcy the Bankrupt was indebted to the petitioner for business done by him as an attorney, and for money laid out and advanced, for which he had no security except the title-deeds of a leasehold estate, belonging to the Bankrupt; which he refused to deliver; unless his debt was paid. His bill of costs was taxed at 490*l*. Upon the 5th of *March* 1804 the leasehold premises were put up to auction by the Assignees; and were purchased by *William Gravshay*, one of the four Assignees, for 320*l*.;

(1) See the note to *Whichcote* v. *Lawrence*, *ante*, vol. iii, p. 740.

the petitioner having been present, and a bidder at the sale. On the 25th of *March* the petitioner received from the Assignees 282*l.* 11*s.* 6*d*, the balance after deducting the expenses and a prior mortgage; and he upon that payment delivered up all the deeds; and afterwards paid a further sum of 43*l.*, claimed by the prior mortgagee. *Crawshay* soon afterwards having sold the premises for 570*l.*, the petition was presented; insisting, that the petitioner has a lien; and his whole debt would have been satisfied, if the estate had been fairly sold, that *Crawshay* could not purchase for his own benefit; and was bound to account for the difference between the sales; and praying, that *Crawshay* may be declared accountable for 250*l.*; and, that the petitioner may be paid the residue of his debt; as having a lien; or, that the sum of 250*l.* may be divided among the creditors, and in that case, that the petitioner may prove the residue of his debt under the Commission.

1806.

Ex parte MORGAN.

The Solicitor-General, and Mr. Wingfield, in support of the Petition, insisted, that the petitioner was entitled to the whole of his debt: a mortgagee, claiming to be paid his whole debt, principal, interest, and costs, before the general creditors are entitled to any thing: their only right being to the equity of redemption, after satisfaction of the whole amount of the mortgagee's demand. All those cases establishing that an Assignee in Bankruptcy shall not be himself the purchaser, are decided, not upon particular circumstances, but upon general rules. The simple question then is, whether the Assignee cannot himself derive any benefit from his purchase, whether he can for other persons. How can the general mass of creditors claim more than the Bankrupt himself could have claimed? In *Lacey*'s case, *Botham* the Assignee, purchased at a sale a mortgaged estate, belonging to the Bankrupt, which was sold under the general order. The assignees of the mortgagee, who was also a Bankrupt, required *Botham* to pay the profit he had made by that purchase. Lord *Eldon*'s judgment was clear, that the mortgagee stood precisely as the general creditors would have stood: and it was admitted, that, as the principle was, that the trustee could not purchase except for the *cestuy que trust*, there was no reason to postpone the first *cestuy que trust* to the second. That is attempted in this instance. If that is the principle, how can this trustee be a purchaser for the second *cestuy que trust* to the prejudice of the first; and the general creditors by this sort of accident get a benefit from that fund, which it is impossible for the Assignee to keep himself?

[8]

Mr. Perceval, and Mr. Cooke, for the Assignees, resisted the petition; contending, that the sale to the Assignee is not a nullity; but he is considered a trustee; and that the petitioner had parted with his lien.

1806.

Ex parte MORGAN.

[* 9]

The Lord CHANCELLOR.—I am not quite sure how this case ought to be decided; but will state what I feel upon it. The petitioner is not a legal mortgagee; but for this purpose is * in the same situation; having an equitable lien, from the possession of the title-deeds, of which he could not be deprived without satisfaction of all that was due to him. It is contended, that it was for the petitioner to say, whether he would insist upon the lien or not; and whether he would be satisfied with the purchase. He was a bidder at the sale, and might have bid higher; might have insisted upon his lien; and have refused to deliver up the deeds; and might have said *Crawshay* could not purchase; the petitioner being a professional man, not unacquainted with the rules as to purchases by trustees, &c. He did not take that course; and there is difficulty upon that to a certain extent. But it is said, on the other side, that, to prevent his coming here to have the benefit of his lien, there must be a sale; and the first sale is considered in law an absolute nullity from the incapacity of the assignee to hold the character of purchaser. If there was no purchase by *Crawshay*, then the second sale must determine the petitioner's right, and the creditors had nothing to do with it; for though the petitioner had given up the title-deeds, he did that upon the ground, that there was a sale that could bind him. The difficulty is, that if a man parts with his lien with his eyes open, he cannot resume it; and the petitioner, having been present at the action, may be considered as having voluntarily given up his lien. I think, he must be entitled to the costs.

[10]

The Lord CHANCELLOR.—I have considered this case; and my opinion is, that the petitioner is, under all the circumstances, entitled to the lien; and the general creditors are not entitled to any part of this money. The purchase by *Crawshay* singly, one of four Assignees, cannot be considered a purchase by the Assignees for the general purposes of the Bankruptcy; and he considered himself as purchasing for the benefit of the estate; for upon the re-sale he carried the produce to the account of the estate; not to his own account; treating it, as if that had been the only sale. The petitioner therefore is not to be considered as having parted with his lien; for the question is between the petitioner and the creditors, not between the petitioner and *Crawshay*. The creditors are entitled to the dividends upon all the Bankrupt's estate; but not upon this estate, until the lien upon it has been satisfied. Under all the circumstances, the petitioner cannot be considered as having parted with his lien.

Therefore the first part of the prayer of this petition cannot be complied with. (*a*)

(*a*) *Ex parte Lacey*, *ante*, vol. vi. 625, and the references.

1806.

Ex parte SURTEES.

Feb. 25.

The choice of Assignees in Bankruptcy not disturbed on the ground, that creditors were prevented by accident from voting; if not kept back by fraud.

Principle of removing an Assignee in Bankruptcy: proof of insolvency, compounding with his creditors, &c. misconduct; or, that an account cannot be conveniently or justly taken, while he remains.

The simple circumstance, that he is to account, not sufficient.

UNDER a Commission of Bankruptcy, issued against *Thomas Ward*, two of the Assignees having been removed by order, a petition was presented, praying, that the two remaining Assignees may be removed: the one, *Whitlock*, as having received money, as Assignee; being insolvent, and compounding with his creditors; as to the other, stating, that bill negotiations had passed between the Bank, in which he was engaged, and the * Bankrupt for the accommodation of that Bank; that they had charged interest and commission in their accounts; suggesting, as a ground for investigating the debt of that Assignee, collusion with the Bankrupt; that the Assignee in *December* 1801, proposing a composition for the Bankrupt, if the petitioners would give up their securities, stated his debt to the Assignee at the sum of 476*l.* 3*s.* only; though by his deposition under the commission it was sworn to amount to 2195*l.* 3*s.* 6*d.* The Bankruptcy happened upon the 24th of *March* 1804. The petitioners claimed as creditors to a large amount. Their proof had been rejected, upon objections to the debt; and, admitting the debt, upon the ground, that they had security; but it was at length admitted under an order. Lord *Eldon* having upon the petition made an order, that *Whitlock* alone should be removed; and that a new Assignee should be chosen, the petitioners applied to have the minutes of that order varied.

[* 11]

Mr. Perceval, and Mr. Leach, in support of the Petition, contended, that, if any question is to be litigated in Bankruptcy with an Assignee, it follows of course, that he must be removed. Where it is a mere matter of account, attended with no suspicion, it would be inconvenient in many cases to remove the Assignee. But in this instance the material question is, whether these charges of commission and interest are not upon Bills drawn for the accommodation of the house, in which this Assignee is a partner: another, whether some of these payments and receipts can be allowed to this Assignee. A strict investigation of the accounts is proposed; which must necessarily be adverse.

The Solicitor-General, and Mr. Trower, for the Assignees.

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There is no rule that, to remove an Assignee, it is sufficient to show, that he is a debtor to the estate; an accounting party; and that an inquiry is desired as to his debt, and the circumstances under which it stands. The case, in which an Assignee has been removed, is, where there is some real contest between him and the creditors. There is no instance, where the ground was merely, that the debt was the balance of an unliquidated account; and the effect in this

1806.

Ex parte SUBTEES.

great commercial city would be, that the office of Assignee must in many instances be filled by creditors to a small amount, for goods sold; all the creditors of a superior class being liable to that objection. Assignees are in the situation of other trustees. It frequently happens, that one trustee files a Bill against another for an account, and after a decree either may prosecute it; and no such objection has been taken. No inconvenience can arise. The Assignee may be examined by the Commissioners, as any other person; and must produce all his books and accounts.

The Lord CHANCELLOR.—The great object of the system of Bankrupt Law is, an equal and impartial distribution among all persons, having demands upon the estate. Therefore the choice of Assignees, a most important circumstance, is properly given to the creditors, in the known proportion, as the persons most interested in that distribution; subject to a controul, the largest, most general, and unqualified, of any of the authorities given to the Lord *Chancellor* in Bankruptcy. It is properly admitted in this case, that the circumstance, that some creditors, whose votes would have turned the scale, were absent by accident, is not sufficient. But if creditors were kept back by fraud Assignees
[13] chosen under such circumstances should be set aside; and a new choice should be made. This however is not a case, in which it is not possible to take that into consideration, for these petitioners unquestionably could not be made a condition to prove, being prevented, not by fraud, but by the nature of their debts, coupled with the accounts they hold. Resorting then to the principle upon which an Assignee may be removed, I take the rule to be this; either, that there must be some misconduct imputed to him; or, where an account is to be taken, as it must be in this instance, I think, it must appear, that the account cannot be taken conveniently or justly, or not so conveniently and justly, while that person remains an Assignee. If that distinction is not to be drawn, the consequence will be dangerous uncertainty and litigation, and frequent applications to remove Assignees, who have in no shape misconducted themselves. Assignees are generally creditors, who, having the greatest interest in the estate, have a right to chuse themselves; and, if among the numerous body of creditors, who have assented to their nomination, the amount of the debt of the Assignee should become matter of dispute, as the creditors have a right to that account, though there is no other reason, must the Lord *Chancellor* in every instance remove him? Such a rule would lead to constant applications for this purpose: introducing new trusts, attended with great confusion and inconvenience in the distribution of the estates of Bankrupts.

1806.

Ex parte SURTEES.

The petitioners must then resort to another principle; that it is not enough that the Assignee must account before the Master; but the circumstances from the nature of his accounts indicate such plain and palpable inconvenience and risk, that it will be necessary that the Assignee should be removed, in order to secure a more impartial and proper decision. As to that it must be recollected, [14] that the account to be taken before the Master does not comprehend the whole system of the distribution of the Bankrupt's property. This is not an account of a general, complicated nature, embracing all the transactions of the Bankrupt. The effect will be, not that the Assignee will have an undue dominion over the affairs of the Bankrupt; but merely to ascertain, whether this debt be of the description the Assignee now contends that it is. Unquestionably there is an extraordinary degree of obscurity and singularity in it; upon the difference between the debt, now claimed, and the amount at which it was formerly represented, and other circumstances. It is not necessary to go into that; for it appears to me, that this account may be taken: the single point being, whether a debt of 2175*l.* 3*s.* 7*d.* exists, or a debt of 476*l.* 3*s.* only; or any other sum. If fraud and collusion with the Bankrupt are out of the case, and the mere question is, whether this account cannot be taken without disturbing the choice of Assignees, it is thrown upon the parties, who seek to remove the Assignee, to establish, that otherwise the account cannot be conveniently taken. This petition fails in that respect. If the Assignee should endeavour to embarrass the account, or, if in the prosecution of it a necessity of bringing an action should arise, that would be a new ground, upon which he might be removed. The principle, upon which I confirm the order pronounced by Lord *Eldon*, is, that an Assignee shall not be removed, merely because he must account; unless there is something in the nature of his interest, rendering it impossible to take the account with due impartiality and justice, or, a degree of misconduct in the Assignee making him unfit to execute such a trust

1806
Feb 25.

Ex parte BARFIT.

The authority of Assignees in Bankruptcy limited to the purposes of their trust, the distribution of the estate under the Bankrupt Laws, and does not therefore extend to an agreement, disposing of the surplus after 10*s.* in the pound to the creditors.

The petition by a party claiming under such a transaction was upon the circumstances dismissed, without prejudice to a bill.

THIS petition, presented in the Bankruptcy of *James Barfit*, stated an agreement by *Charles Barfit*, the Bankrupt's father, to sell to his son *James*, a farm, and the stock upon it, at the price of 1000*l.* Possession was given accordingly: but after some time, the money not being paid, a bond was given. Soon afterwards *Barfit*, the father, died; having by his will bequeathed a legacy of 300*l.* to his other son *John*, and the residue to his wife, the petitioner. Upon her application to her son *James* for the money due on the bond, he agreed to pay her 500*l.*, and to pay the remainder in a fortnight, or to give up the stock. The money not being paid, the petitioner resumed the possession of the farm and stock. A fortnight afterwards *James Barfit* became a Bankrupt. An agreement was entered into between the petitioner, the Bankrupt, his Assignees, and *John Barfit*, that *John Barfit* should be the Assignee; that the stock should be sold; and he should pay 10*s.* in the pound to the creditors, and should be a trustee of the residue for the petitioner. An assignment was made to *John Barfit* accordingly.

The petition stated, that *John Barfit* had sold the stock at an under-value, and had turned the petitioner out of possession of the farm; and that nearly all the creditors had been paid 10*s.* in the pound. The prayer of the petition was, that *John Barfit* may account as Assignee; that, the surplus beyond the amount of 10*s.* in the pound to the creditors may be ascertained; and applied in payment of the sum of 1000*l.* due on the bond, and another sum, due to the petitioner; offering to allow to *John Barfit* what was due in respect of his legacy

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Mr. Hart, in support of the Petition.

The Solicitor-General objected, that this transaction is a proper subject for a bill; not for the jurisdiction in Bankruptcy by petition.

The Lord CHANCELLOR.—In many cases, from the magnitude of the subject, and other circumstances, though in other respects proper for the jurisdiction by petition in Bankruptcy, a bill has been directed *Bromly* v. *Goodere* (*a*) before Lord *Hardwicke*, is a remarkable instance; and if I am not absolutely bound to go to the extent of the jurisdiction, this is peculiarly a case, upon which that course should be taken; for this transaction goes beside the whole purpose of the Bankrupt Laws. The Assignees represent the

(*a*) 1 *Atk.* 75.

creditors, and can bind them, for purposes connected with the trust, the distribution of the property under the Bankrupt Laws; but have no authority to enter into such an agreement as this. Another reason upon which this appears to be a case proper for a bill, is, that this is a transaction between a mother and a son; and that possession was taken immediately; which may be much better investigated in the course of a cause than by this summary mode, and without an opportunity to appeal.

Dismiss the petition without prejudice to a bill.

1806.

Ex parte BARFIT.

[17]

GOMPERTZ *v.* ————

Feb. 27.

THE Defendant, a purchaser, moved for a reference to the Master upon the title.

The practice to direct a reference upon the title on motion after answer limited to the case, where the title only is disputed.

Mr. Martin, in support of the Motion, said, this was considered the settled practice since the case of *Moss* v. *Matthews*; (*a*) which was followed by Lord *Eldon* in *Wright* v. *Bond*; (*b*) and in that case the order was made upon the motion of the Plaintiff, the vendor.

The Solicitor-General, for the Plaintiff, opposed the motion; observing, that the subject of the purchase was a lease; and the only objection, whether the purchaser had a right to see the title of the lessor appeared upon the answer, and, as nothing more can appear upon the report, the practice, that is urged, the object of which is to avoid expense, will, if adopted in this instance, have the effect of increasing it.

The Lord CHANCELLOR.—The rule, as applied by Lord *Eldon*, is very reasonable and wise; where the Defendant admits the agreement, and is ready to carry it into execution; provided he can have a good title; which alone he disputes. But the question in this case is very different; not whether the Plaintiff has a good title, but whether upon such a contract, for the sale of a lease, he has undertaken to produce the lessor's title. The rule therefore not being applicable to this case, the order cannot be made.

(*a*) *Ante*, vol. iii. 279. *Ante*, vol xi. 59.
(*b*) *White* v. *Foljambe*, *ante*, vol xi. 337.

1806.

Feb. 27, 28.

FISHER v. BAYLEY.

A reference of the answer for impertinence is good cause against dissolving an injunction.

THE usual order for dissolving the injunction, unless cause, having been obtained, a reference of the answer for impertinence was shown for cause.

Mr. Martin, for the Plaintiff, insisted, that a reference for impertinence is sufficient cause against dissolving the injunction: *Hurst* v. *Thomas*; (*a*) *Swann* v. *Mills*; (*b*) *Shendon* v. *Carpenter*; (*c*) and a late case (*d*) before Lord *Eldon*; who repeatedly said, it is impossible to know, whether the answer is sufficient, until the reference for impertinence is disposed of; and the two references are consistent.

The Solicitor-General, (*Amicus Curiæ*,) said, Lord *Eldon* had decided, that a reference for impertinence is an answer to a motion to dissolve an injunction; and it is impossible to refer for insufficiency, until the reference for impertinence has been disposed of. The answer may be both impertinent and insufficient; and exceptions for insufficiency cannot be taken, until the question as to impertinence is decided; for by the exceptions the opportunity of referring for impertinence is waived.

Mr. William Agar, for the Defendant, cited *Milner* v. *Golding*; (*e*) and observed, that the only reason for continuing the injunction is, that the answer is insufficient; and
[19] the reason, that a reference for impertinence cannot be made after exceptions taken, is, that the Plaintiff has acted upon the answer.

The Lord CHANCELLOR.—Though I had very little doubt upon this point I would not hastily decide it; as it is proper, not only that the practice of any court should be clear and precise, but that as great a similarity of practice should prevail in the different superior courts of *Westminster-Hall* as can be. I have observed great inconvenience, arising from the difference of practice in the courts of King's Bench, Common Pleas, and the Law side of the *Exchequer*. There is also infinite advantage in connecting practice, as much as possible, with the substance of justice. At the same time, though I should not be able so to connect them, and even though it should seem to me, that justice would be advanced by a different decision, I should adhere to the practice; which, though it may not appear at first, is generally founded in convenience and justice.

The reason, alleged by *Mr. Martin* in the case of *Hurst*

(*a*) 2 *Anstr.* 591. (*b*) *Fowler's* Exch. Pract.
(*c*) In the Court of Exch. 1799.
(*d*) *Pellew* v. ——, *ante*, vol vi. 456. (*e*) 2 *Dick.* 672.

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FISHER v. BAYLEY.

v. *Thomas*, (a) in support of the practice, for which he now contends, appears to be founded in good sense. That reason is, that, as exceptions taken waive the objection for impertinence, the latter must be first disposed of; and, as exceptions may be shown for cause against dissolving the injunction, all proceedings, necessarily preceding them, must also be sufficient cause. I have seen Baron *Thompson*, who says, upon every rule of practice in the Court of *Exchequer*, and every principle, that ought to guide, that rule ought to be adhered to. I have also stated the point to Lord *Eldon* and Sir *James Mansfield*: who clearly concur in that opinion. The reason of the thing also clearly requires the Defendant to wait for the Master's decision upon the point of impertinence. The Court, considering the merits of the answer, is not to wade through all the impertinence that may be contained in it; and should not sit in judgment upon the question, whether the equity of the bill stands unimpeached, or the Defendant has delivered himself from it, until it is clear, that he has put in such an answer as deserves the name of a pleading.

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For these reasons my judgment is, that the injunction ought not to be dissolved pending the reference to the Master for impertinence.

(a) 2 *Anstr.* 591.

ERRINGTON v. CHAPMAN.

ROLLS. *Nov.* 25, 26.

Maintenance not allowed upon legacies by a grandfather to his grand-children, at 21, with interest; though the father was not of ability to maintain them: the interest being given over in the event of death under 21.

THOMAS ERRINGTON by his will, after giving certain portions of his personal estate to the Defendants, whom he appointed trustees and joint executors in trust for the benefit of his daughter *Mary Mitchell*, widow, and her four children: and of his son *Robert Errington*, and his children; and giving such trustees the power of applying the interest and dividends of the principal sums thereby bequeathed, for the maintenance and education of the respective children of his said daughter and son, after their respective deceases, until such children should be of age, and also of applying such part of the principal as they should see proper for placing such children out in the world, and giving some specific legacies, gave and bequeathed all the residue of his personal estate, whatsoever and *wheresoever, &c. to the Defendants, upon trust. that they should pay to his grandlaughter *Ann Errington*, when and as soon as she shall attain her age of 21 years, the sum of 1000*l.* with interest for he same, from the expiration of 12 calendar months next

[* 21]

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ERRINGTON v. CHAPMAN.

after his decease: but in case his said grand-daughter shall die without leaving issue, before she shall have attained her age of 21 years, then, that they shall pay the said sum of 1000*l.*, with interest and produce thereof, unto his grand-son *Thomas Errington*, when and as soon as he shall have attained his age of 21 years; and that they shall pay, assign, &c. all the remainder of the residue unto his said grand-son *Thomas Errington*, when and as soon as he shall attain his age of 21 years: but in case he shall happen to die without leaving issue, before he shall have attained that age, then that they shall pay, assign, &c. such residue and overplus of the said residue of his personal estate unto his said grand-daughter *Ann Errington*, when and as soon as she shall attain that age of 21 years: but in case both them, his said grand-children *Thomas* and *Ann Errington*, shall die without leaving issue, before either of them shall have attained their age of 21 years, then that the trustees shall pay, assign, &c. the said sum of 1000*l.*, with the interest thereof, so given and bequeathed unto his said grand-daughter as aforesaid, and also the said remainder of the said residue or overplus of his personal estate, and the respective dividends, interest and proceeds, thereof, in manner following: *viz.* shall pay, assign, &c. one moiety unto and amongst all and every the children of the testator's son *Robert Errington*, who shall be then living, and the issue of such as shall be then dead, leaving issue, equally, if more than one; and the other to the children of his daughter *Mary Mitchell*, in the same manner, and he directed, that his trustees, and the survivor of them, [22] &c. should have the like power of applying the dividends, interest, and proceeds, and also any part of the principal, as is hereinbefore given to them in respect of the before mentioned legacies or sums of money, respectively bequeathed to his said son, *Robert Errington*, and daughter *Mary Mitchell's* children.

The bill was filed on behalf of the infants, *Thomas* and *Ann Errington*, against the executors for an account, &c.; and praying, that the Plaintiffs may be declared entitled to have a proper sum allowed for their respective maintenance and education to their father, during their minorities, out of the interest and dividends of the legacy and residue, to which they are entitled.

The executors by their answer stated their belief, that the father of the Plaintiffs is not of sufficient ability to maintain them suitably to their future fortunes.

Mr. Romilly, and Mr. Trower, for the Plaintiffs.—A legacy to a grand-child, as a legacy to a child, is considered as a portion; and though the will has no direction for maintenance, interest ought to be paid. In *Crickett* v

1806.

EARLINGTON v. CHAPMAN.

Dolby (a) that is stated to be the opinion of Lord *Alvanley*; though there is no decision upon it. This testator has said, this legacy of *1000l.* shall be paid at the age of 21, with interest from the end of 12 calendar months after his death; which certainly admits two constructions: but that which supposes maintenance intended is the more probable; maintenance being expressly directed for the other grand-children out of the property bequeathed to them. The bequest over to the grand-son, upon the death of the grand-daughter, without leaving issue, certainly supposes accumulation. But the construction should be, that the interest accrues to the grand-son only from the time at which he is to be entitled to the legacy: *viz.* interest from the death of the grand-daughter, until the grand-son shall attain the age of 21. The question, as to the residue given to the grand-son, is nearly the same. In such a case, a grand-father providing subsistence for his grand-children, the court will make that construction that will provide maintenance; and not leave them wholly destitute; as otherwise they will be until their legacies are payable: their father being unable to support them. Though accumulation is directed, the court has thought itself at liberty to give maintenance; though certainly the consent of the person to whom the legacy was given over, was required: *Greenwell* v. *Greenwell* (*a*); and the cases there stated.

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V. Barnes, for the Trustees, distinguished those cases upon that circumstance; that all the persons interested were before the Court.

November 26.

Whether a legacy to a grand-child, payable upon a contingency, or at a future day, shall carry interest, as in the case of a child, *Query*.

The MASTER *of the* ROLLS.—The question in this cause is not, whether a legacy to a grand-child, payable upon a contingency, or at a future period, shall carry interest; upon which there has been some difference of opinion in this court: Lord *Alvanley* in the case cited intimating the strong tendency of his opinion in favour of giving interest to a grand-child: Lord *Hardwicke* certainly having held, that a grand-child does not stand in that situation; and the present Lord *Chancellor* (*b*) in *Perry* v. *Whitehead* (*c*) *intimating his opinion, that a grand-child does not fall within the rule for giving interest upon a legacy to a child, though it is not expressly given, and the legacy is payable at a future period. In this case interest is given: but the question is, whether the interest is not payable at the same time as the legacy; and to go over on the same event. To aid the construction, it is argued, that an intention for maintenance appears. But I think, an intention for maintenance

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(*a*) *Ante*, vol. iii, 10. See page 12.

(*a*) p. 23, *Ante*, vol. v. 194. See *Lomax* v *Lomax*, *ante*, vol. xi. 48. *Ex parte Kebble*, *ante*, vol. xi. 604.

(*b*) Lord *Eldon*

(*c*) *Ante*, vol. vi. 544

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during the life of the parent does not appear in any part of the will; for where maintenance and education are directed, the expression is, "after their respective deceases." The question in this cause however turns upon the legacy of 1000*l.* That is a legacy, so given as to be payable only on the event of the legatee's attaining the age of 21. There is no separate gift of the legacy. The time is annexed to the gift. According to the natural construction, the interest is payable at the same time. Upon the death of the grand-daughter under the age of 21, that is given over; and there the word, "produce" is added. It is contended that those words "with interest and produce thereof," in the bequest over to the grand-son of that legacy, mean interest to go to him after the death of the grand-daughter; and some ambiguity might arise upon that, if the bequest over after the death of both did not clearly indicate, that the interest is to accompany the legacy always, and to go over with it: the direction being to pay "the said sum of "1000*l.* with the interest thereof so given and bequeathed "unto his said grand-daughter as aforesaid." The legacy is to go over with the interest; and that bequest over to the other grand-children is not open to the observation, that the interest after her death may be intended; for they are to take immediately upon her death the interest and the capital; which can mean nothing but the interest to grow due before her death.

[25] As, therefore, these two grand-children have not the legacy given to them absolutely and in all events, but, it is given over to the other grand-children, it does not fall within the principle of *Greenwell* v. *Greenwell* (*a*); in which case there was no consent; all being infants: but the fund was to go among them all. This is a hard case; as it is stated, that the father is not of ability to maintain his children. But there is no fund, out of which the interest can be given.

Bill dismissed.

(*a*) *Ante*, vol. v. 194.

1806.

ROLLS.

Nov. 29.

FLUDYER v. COCKER.

A purchaser, taking possession without a conveyance, was compelled to pay interest; though the money was to be paid at a particular day on the execution of the conveyance. (1)

IN 1792 the Defendant entered into contracts for the purchase of estates of the Duke of *Newcastle*, in three lots. Two of the lots were purchased by private contract on the 7th of *May*, and the 18th of *July*: the duke of *Newcastle* covenanting to convey respectively, on or before the 25th of *June* and the 18th of *February* following; and the Defendant covenanting to pay the purchase-money at the time of executing the conveyances. The Defendant was let into possession of the premises comprised in those lots at *Midsummer* and *Christmas* 1792 respectively. In *July* the Defendant purchased the third lot, by auction: the conditions of sale providing that the purchaser should pay down a deposit; and sign an agreement for payment of the remainder of his purchase-money on or before the 18th of *February* 1793, on having good titles; abstracts of which would be ready to be delivered to each purchaser on the 6th of *November* then next; and that the purchaser should have a proper conveyance on payment of the remainder of the purchase-money, according to the before-mentioned condition; and be entitled to the rents and profits from *Christmas* 1792. The Defendant received the rents of the premises, comprised in that lot, at *Midsummer* 1793.

[26]

In 1798 the purchaser, in answer to an application for the residue of the purchase-money, with interest, offered, when the conveyances should be executed, to pay the residue of the purchase money, or to relinquish the purchases, and account for the rents and profits, upon having his deposit restored, but refusing interest; upon which the bill was filed, praying, that the defendant may be decreed to pay to the plaintiff, as surviving trustee for the sale, the residue of his purchase-money, with interest from the respective times when it ought to have been paid, &c.: the plaintiff offering, on being paid the remainder of the purchase-money, with interest, to deliver the conveyances.

The Defendant by his answer stated, that the abstract was sent in 1793 or 1794; and immediately returned with approbation of the title; and that he was informed in 1796, that the conveyances were ready. He submitted to pay the remainder of his purchase-money; but disputed the claim of interest. He admitted, that he had not deposited or set apart the money.

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(1) *Boyle v. Rowland*, 3 Dessaus. Cha. Rep. 555. *Shaller v. Bylund*, 6 Binn. 435, 438. *Hardisty v. Lyons*, 5 Munf. 342. *Hepburn v. Dunlop*, 1 Wheaton 179. See also *Ramsay et al. v. Brailsford*, 2 Dessaus. Cha. Rep. 582.

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Mr. Romilly, Mr. Hollist, and Mr. Winthrope, for the Plaintiff, upon the ground, that possession was taken by the Defendant, pressed for the interest.

Mr. Piggott, Mr. Fonblanque, and Mr. Wynne, for the Defendant.—Admitting the general rule, that a purchaser taking possession, must pay interest, there may be cases of exception; and in *Powell* v. *Martyr* (*a*) it is laid down, that there may be a case, in which a purchaser, though he has the rents and profits, shall not pay interest. In this instance, the Plaintiff not having completed the title, and delivered the deeds, it will be going further than any case to ingraft interest upon the money; which specific sums, to be paid on an event, depending upon acts, to be done by the vendor, forming a condition precedent to the payment of the purchase-money. The principle stated in the late case, *Dickenson* v. *Heron*, (*a*) that the agreement to pay interest is affected by unreasonable delay, applies. The delay is to be attributed entirely to the Plaintiff.

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The reply was stopped by the Court,

The MASTER *of the* ROLLS.—There is no doubt upon this. The purchaser does not allege, that any circumstance has occurred, entitling him to relinquish the contract. The only question is, how the contract was to be carried into execution. What are the legal rights is totally immaterial. At Law the purchaser could not have the right to the estate, nor the vendor to the money, until the conveyance was executed. But that has nothing to do with the mode, in which this Court executes the agreement. The purchaser in the case have said, he would not have any thing to do with the estate, until he got a conveyance. But that is not the case he took. He enters into possession, an act, that generally amounts to a waiver even of objections to title. It proceeds upon the supposition that the contract will be executed; and therefore agrees, that from that day he will treat it, as if it was executed. The act of taking possession is an implied agreement, to pay interest, for so absurd an agreement, as that the purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied. The purchaser does not state any circumstances; any inconvenience that he has sustained by not having the conveyance; any applications by him for a conveyance at an earlier period. He rests upon the agree-

Possession taken generally amounts to a waiver even of objections to title. (1)

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(*a*) *Ante*, vol. viii. 140.

(*a*) p. 27. *Sugden's* Law of Vendors and Purchasers of Estates, 321, Ed. 2.

(1) See *Roach* v. *Rutherford*, 4 Dessus. Chs. Rep. 135.

ment, implied from the fact of possession taken. It would sound very strange, if the purchaser had paid the money, as being bound to pay it, and the vendor having had the use of it for four or five years, should then refuse to account for the rents and profits; which is this case. The only question is, what is the equitable arrangement between the parties. There is not a ground for refusing the payment of interest.

1806.

FLUDYER v. COUSEN.

The decree was made with costs.

SHORTBRIDGE'S CASE.

Feb. 28.

Order under circumstances to pay dividends to trustees, or one of them. (1)

UPON a motion for an order to pay the dividends of a [illegible] trust fund, standing in the name of the accountant-general to the trustees, the order prayed was that the dividends might be paid to the trustees or one of them.

Mr. Hewson, in support of the Motion, urged the expence and inconvenience of taking the usual order in this instance: the fund being a very small balance: and the trustees [illegible] in number, all living in different parts of the country, and one in *Scotland*; and produced an order in *Staples v. Staples* (a) to pay to two trustees or one of them.

Lord CHANCELLOR, under these circumstances, made the order that was prayed according to the motion.

Easter Vacation, 1802.

(1) See *Methodist Epis. Church v. Jaques*, 3 Johns. Cha. Rep. 1.

1806.

ROLLS.

June 1, 27.
Aug. 7.

ROSE v. CUNYNGHAME.

Devise and bequest of all the testator's real and personal estate in *Grenada* to pay all such Annuities, legacies, or bequests, as he should give or bequeath to be paid out of, or charged upon, his real or personal estate in *Grenada* by his will or any codicil, whether witnessed or not.

A charge by an unattested codicil is void: this being, not a charge by the will of legacies, but a reservation by a will, executed according to the Statute of a power to charge by an unattested paper. (1) As to the objection, that the real estate was not charged as a subsidiary fund to the general personal estate, *Query*.

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ROBERT UDNY by his will, dated the 1st of *June* 1801, and duly executed according to the Statute of Frauds, (*a*) devised to trustees, their heirs, executors, &c. a plantation, called *Calavery*, and all his other lands, tenements, and real estates whatsoever in the Island of *Grenada* in the *West Indies*, and all his slaves, utensils, &c. and all other his personal estate whatsoever, &c. in the said island; upon trust by and out of the produce and annual profits of his said real and personal estate in the said island of *Grenada*, to pay off and discharge all debts and incumbrances, to which the said estates should be liable at his decease; and also to pay off and discharge all such Annuities, legacies, or bequests, as he should give or bequeath to be paid out of and from, or charge and make chargeable, upon, his real or personal estate in the said island of *Grenada* by his will or by any codicil or codicils thereto, or by any writing or writings at any time or times hereafter, signed by him, or in his own hand-writing, whether witnessed or not; and after payment and satisfaction of the said debts and other incumbrances, Annuities, legacies, and bequests, as aforesaid, to lay out all the residue of the annual produce of his said estate, with all the future rents, and also the produce of his personal estate in the island of *Grenada*, upon trust to accumulate till 1810; and then the estate to go to his nephews; and the accumulation * was to compose a part of the residue of his personal estate, and to be disposed of accordingly.

By a subsequent clause of the will the testator declared, that he did thereby charge and make chargeable his said estates and plantations in the island of *Grenada* aforesaid with the payment of one Annuity, or clear annual sum of 200*l.*, to be paid and payable to his wife *Martha Udny* and her assigns, by equal half-yearly payments, for and during the term of her natural life, in satisfaction of the covenant in his marriage settlement. He afterwards further gave and bequeathed and charged and made chargeable his said estates and plantations in *Grenada* with the payment of another Annuity of 1000*l.*, to be paid to his daughter *Mary Cunynghame* and her assigns, for life, upon certain conditions.

The testator afterwards gave to the same trustees, their

(*a*) Stat. 29 Ch. 2. c. 3.

(1) See *Winslow et ux. Appellants*, 14 Mass. Rep. 421.

heirs, executors, &c. his estates at *Teddington*, and all other his freehold, copyhold, and leasehold estates in *Great Britain*, which he was then or might be at his decease seised or possessed of, (except some freehold and leasehold premises in *Paternoster-row*, *London*, which he afterwards gave to his daughter,) and all his ready money, securities, stocks, &c. and all his real and personal estate whatsoever and wheresoever, which he should be possessed of, or entitled to at his death and have a right to dispose of (except such part of the same, of which by that his will, or by any codicil or codicils thereto, or by any writing to be signed by him or wrote in his own hand, whether witnessed or not, he has disposed or shall dispose,) upon trust, with all convenient speed after his decease, to call in and sell all his property, both freehold, copyhold, and leasehold, and all other his said real and personal estate and effects, (except as before excepted,) and also except his stock, which he particularly desired his trustees should not dispose of at a less price than he had purchased at, unless an absolute necessity requires, that any part thereof should be sold to enable them to make payment of any his debts or legacies, (in which case he gave them full power to sell and dispose of any such part of his said public funds as may be by them deemed necessary for those purposes;) and he declared that his said trustees and executors should stand possessed of and interested in the moneys, which shall so come to their hands by the several ways and means hereinbefore last mentioned: upon the following trust:

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"Upon trust to pay and discharge my funeral expenses "and the charges of proving this my will, and all debts "which shall be due and owing by me at the time of my "decease, (save and except such debts, charges, and incum-"brances hereinbefore provided for as affecting my *Grena-"da* estates, or with which the same are, by this my will, or "hereafter shall be, particularly liable and charged; all "which are to be paid by and out of my said estates and "property in the said island as hereinbefore directed,) and "also all such legacies or pecuniary bequests as I have by "this my will given, or which I shall give by any codicil "or codicils hereto or by any writing or writings to be "signed by me or in my own hand-writing whether wit-"nessed or not, provided I shall not charge the same by "such codicil or writing on my *Grenada* estate."

The testator then gave several legacies, and among them to the trustees in his daughter's marriage-settlement 3000*l.*, upon trust to be laid out in the funds for her separate use for life, and after her death for her children; and he directed his trustees and executors to pay his daughter for her separate use interest for that sum at *5 per cent.*, unless they shall by the aforesaid sale and other dispositions of

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his said real and personal estate find it perfectly convenient to invest the principal. Then after a farther provision, of 10,000*l.* stock after the death of his wife, for his daughter and her children, he declared, that if his daughter or her husband should insist upon their claims under her settlement, before a competent part of his aforesaid freehold, copyhold, and leasehold estates, and of other his estates both real and personal to answer and satisfy all his debts, and the legacies or bequests he had or should thereby or otherwise, as aforesaid, give and bequeath, as well as the said sum of 15,000*l.* can be disposed of and received, the said sum of 5000*l.* should stand revoked, and sink into the general residue of his estate. He then gave the premises in *Paternoster-row* to his daughter; and to her and his wife, 500*l.* each for mourning, to be paid within six months after his decease. As to all the rest, residue, and remainder of his said estates both real and personal, and the produce or proceeds thereof, he directed his trustees and executors (after payment of the legacies hereinafter bequeathed to them) to invest the same in the funds to accumulate for the first son of his daughter that should attain the age of 21.

By a codicil, dated the 5th of *June* 1801, the testator gave several pecuniary and specific legacies; and among them to his wife her trinkets, linen, and other articles, and 500*l.* for furnishing a house. He made other codicils, principally giving small legacies, all the codicils being written by himself, and signed, but not attested. The question arose upon the following disposition, by one of those codicils.

[33] "By this further codicil to my will and other codicils "dated this 27th day of *August* 1701, (*a*) I have my dear "wife that she may suffer no inconveniency from the "change of her situation an additional 100*l.* per annum "from my *Grenada* estate, on the same terms of the former "200*l.* to be paid to her by my executors, being in all 300*l.*"

Under the bill of the trustees a decree was made, among other things, directing an inquiry, what incumbrances affect the estate in *Grenada*. An exception was taken to the Master's report for not stating the Annuity of 100*l.* given to her by the codicil.

Mr. Richards and Mr. Thompson, in support of the Exception—The questions upon this exception are, first, whether a charge upon real estate of all debts and legacies by a will, duly executed, shall give effect to a legacy by a codicil; the personal estate not being charged in the first instance: if not, 2dly, whether the personal estate is not sufficiently charged in the first instance to bring this within the excep-

(*a*) The original was so.

tion, that has been adopted. Though *Hannis* v. *Packer* (*b*) is a case of real and personal estate so charged, Lord *Hardwicke* does not state any distinction, whether the personal estate is charged, or not. In *Hyde* v. *Hyde* (*c*) the charge was considered good; and no distinction was taken between a charge upon the real estate alone, and in aid of the personal estate. *Dicta* to the same effect are to be found in all the cases, exept *Habergham* v. *Vincent*. (*d*) Upon the analogy to the case of debts, why may not a testator charge a future legacy, as well as a future debt? It is admitted, that future debts are charged; though the principle is not very clear: but why is not the analogy to be carried throughout; the principle being the same? The ground is, that, the personal estate being fluctuating, it is impossible to say, what it will be at the death. There is no decision either way; and the *dicta* do not look to the distinction, made by Lord *Rosslyn* in *Habergham* v. *Vincent*. Is it upon the intention, or from the circumstances of the case? There is no instance of an inquiry, whether the testator had any personal estate; or, if he had, whether the amount bore any proportion to the real estate. The personal estate in *Grenada* is no more specifically given than that in *England*. The object of the will is to separate the different parts of the property; that in *Grenada* being disposed of in one way; that, situated in other places, in another. No particular case is to be found with circumstances like these; but there is no distinction in principle between this and the cases, that have been decided, and are now become the law of the Court; for here is that state of property, that forms the foundation of the rule: personal estate, a fluctuating fund, that might be sufficient, or may be exhausted, which is the first fund for the debts and legacies; and, that being exhausted, this Annuitant is entitled to stand upon the real estate; though the codicil is unattested.

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Mr. Romilly, and Mr. Cullen, for the Report.—To bring this case within the decisions upon this point the annuity must be first a charge upon the general personal estate: that is, the general personal estate must be first applicable; and the real estate only, in case the personal estate should be deficient; for there is no decision, that a legacy or annuity is a good charge upon real estate, unless the general personal estate was made first liable to that legacy or annuity. In this instance, the personal estate in *Grenada* is just the same as any particular part of the personal estate; as the furniture of a particular house, or the stock of a farm. The reason of the authorities decided does not reach such a case: a specific bequest of a particu-

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(*b*) *Amb.* 556. (*c*) 1 *Eq. Ca. Ab.* 409. (*d*) *Ante*, vol. ii. 204.

1806. lar part of the personal estate for the satisfaction of an Annuity. The principle has no application to a legacy, charged upon real estate, and some one part of the personal estate. The personal estate in *Grenada*, or in *England*, is not the natural fund for the debts and legacies; which is the personal estate, not specifically bequeathed. A bequest of a sum of money, charged upon real estate, is in effect only a devise of a portion of that estate; and a person cannot by deed reserve, or give to another, a power to devise real estate by an instrument, not executed according to the Statute; (a) *Jones* v. *Clough*. (b) The only exception is the case of a charge in the first instance upon the personal estate: *Brudenell* v. *Boughton* (c) In *Habergham* v. *Vincent* (d) Lord *Rosslyn*, from a correct manuscript note says, that Lord *Hardwicke* proceeded entirely upon the circumstance, that the personal estate was first charged for payment of the legacies. The ground of the decisions, that legacies by a codicil, not executed according to the Statute of Frauds, are a charge, if charged upon an estate, that is a subsidiary fund, is there stated. It is analogy to the case of debts; as, in the case of a charge of all debts upon real estate the testator by the very act of contracting a debt makes a charge. The court has proceeded upon that analogy; and it is not now worth considering, whether it is very sound. In *Hannis* v. *Packer* (e) the real estate was
[36] subsidiary to the personal estate. In *Sheddon* v. *Goodrich* (a) this doctrine was very much considered by Lord *Eldon*; whose opinion was, that under such a disposition the party must be considered as taking an interest in real estate; and his Lordship upon a very full view of all the authorities, did not find any, deciding, that an instrument, not executed according to the Statute, could be a primary charge upon real estate. This is nothing more than an attempt to reserve a power to charge real estate by an unattested instrument. This is not a general charge for the payment of legacies, as in the other cases: the expression is only as to such legacies as he shall charge upon the estate in *Grenada*.

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The MASTER *of the* ROLLS.—I shall give no final opinion at present. But this case is materially different from any, that have been hitherto decided; for the charge is of a very peculiar nature; not of all legacies he shall afterwards give; but of all such legacies as he shall afterwards charge upon the estate, or make payable out of it. Suppose he had given a general legacy by his will: that would not be charged upon this estate: nor a general legacy by a codicil. For that purpose the legatee must show, that his

(a) Stat. 29 *Ch.* 2. *c.* 3. (b) 2 *Ves.* 365. (c) 2 *Atk.* 268.
(d) *Ante*, vol. ii. 204. See page 236. (e) *Amb.* 556.
(a) p. 36. *Ante*, vol. viii. 481.

legacy was made chargeable upon, or payable out of, the *Grenada* estate. That seems in effect a reservation by a will, duly executed, of a power to charge the *Grenada* estate by a will, not duly attested. When a man by a will, duly executed, charges all legacies, generally, expressing his resolution, that, whenever he gives them, they shall be a charge, it is determined, that, whenever given, they shall be a charge. But according to this, it is not in the duly attested will alone that you find the charge: but the intention to make it a charge may be in the unattested instrument, the codicil. This is a new case; nearer to *Habergham* v. *Vincent* (*a*) than any other; where by a will, duly attested, the testator seemed to reserve to himself a power to dispose by a deed.

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The MASTER *of the* ROLLS.—I stated my impression as to this case before; and regret, that further consideration has not induced me to alter that impression; as the consequence is, that the widow is deprived of a part of that provision, which was obviously intended for her. The ground, upon which it is contended, that this additional Annuity of 100*l.* might be good as a charge upon the *Grenada* estate is, that, the estate being once charged with all legacies and Annuities, the testator may afterwards give either legacies or Annuities by an unattested codicil; that the rule is so settled in many cases; and, if this were that case, unquestionably it is too well established to be now disturbed; though it may be doubted, whether it is perfectly consistent with the Statute of Frauds; (*b*) for, in effect, the testator does dispose of his land by an unattested codicil, when he is at liberty to burthen it with legacies, so given. However in this case the testator does not charge the *Grenada* estate with legacies or Annuities, generally; but with such only as he shall afterwards give, and charge upon that estate: so that, as legacy, or Annuity, it is not at all chargeable upon the estate: but it is, as he has thought fit by an unattested codicil to declare, that it shall be a charge upon the estate. The reason, that debts and legacies may be a burthen upon the estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain, what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him, to give. The Court has therefore said,

August 7.

The reason, that a charge of debts and legacies upon real estate by a will duly executed covers future debts and legacies, though by an unattested instrument, as their fluctuating nature.

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(*a*) *Ante*, vol. ii. 204. (*b*) Stat. 29 Ch. 2, c. 3.

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that, when he has by a will, duly executed, charged debts and legacies, it is only necessary to show, that there is a debt, or, that there is a legacy, in order to constitute a charge; for the moment that character is shown to belong to the demand, you show, that it is already charged upon the estate. Then, an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it, that it is a legacy; and then the charge immediately attaches by virtue of the executed will. But here the testator says, he does not now determine, that all Annuities and all legacies he shall hereafter give shall be charges; but only, that, if at some future period he shall think proper to declare legacies and Annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found; but also the will of the testator to make it a charge upon this estate: without which it is not a charge. That is only an attempt to reserve by a will, duly executed, a power to charge by a will, not duly executed. It is the case of *Habergham* v. *Vincent*. (*a*) It might as well have been contended in that instance, that there was an adoption into the the will of that future instrument: but the opinion of the Lord *Chancellor* and the Judges was, that it was not competent to a man to give himself such a power; *viz.* a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make, for, unless he thinks fit, when he makes his codicil, to declare his intention, that his land shall be charged with the legacy or Annuity, it shall not be charged. Then it is through the [39] medium of an unattested instrument, that it is to be a charge upon land; and that cannot be within that case. The Master is therefore right in reporting, that this Annuity of 100*l.* is not a charge upon the *Grenada* estate; and the exception must be over-ruled.

(*a*) *Ante*, vol. II. 204.

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ROLLS, *Aug. 7.*

ANTROBUS *v.* SMITH.

Receipt for a subscription to a Navigation, with an indorsement, signed by the owner, declaring, that he thereby assigned to his daughter *A.* all his interest, found among the papers of his executrix: no evidence, that he ever parted with the paper; and a declared intention of satisfaction by a marriage portion. Bill for an assignment dismissed. (1)

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GIBBS CRAWFURD, being entitled to ten shares of 100*l.* each in the *Forth* and *Clyde* Navigation, wrote upon the receipt for one of the subscriptions, and signed the following indorsement, dated the 4th of *October*, 1790:

"I do hereby assign to my daughter *Anna Crawfurd* all "my right, title, and interest of and in the inclosed call and "all other calls of my subscription in the *Clyde* and *Forth* "navigation."

Anna Crawfurd afterwards married *John Antrobus*; and died on the 18th of *June* 1793. Her father died in *October*, in the same year; and her husband in *April* 1794. *Anna Crawfurd*, the widow of *Gibbs Crawfurd* and mother of *Mrs. Antrobus*, died in 1797; and a short time after her death the elder of her two sons, both of whom under the execution of a power of appointment, given to her by the will of her husband, took the residue of his personal estate, searching a closet in the country house of his father in *Sussex*, found the receipt above stated, with the indorsement, in a pocket-book, which had belonged to his mother, with other papers relating to his father's personal estate, and securities for money due to him.

The bill was filed by the brother and personal representative of *John Antrobus*; praying, that a proper assignment of the canal share may be executed; and that the receipts given on that account may be delivered up.

The two sons of *Mr. Crawfurd* by their answer stated, and it was proved, that subsequent to the date of the indorsement on the receipt their father considered himself as owner of that share, and in 1791 and 1792 sat constantly as one of the committee, and as a director; having no other interest in the navigation except that share or subscription. They also represented that the portion of 10,000*l.*, given by *Mr. Crawfurd* upon the marriage of his daughter, was intended to be in lieu of all claims and demands whatsoever by her or her husband. They suggested, that in case the said receipt with the said indorsement was ever delivered to *Anna Antrobus*, some agreement, engagement or undertaking was entered into previously to or at the time of her marriage to relinquish her right under it.

The Plaintiff, by his answer to a cross bill, stated, that he was informed by his brother, that in a conversation respecting the canal share *Anna Antrobus* said to her father, "you "know, father, you gave to me 1000*l.* of that stock;" upon

(1) See *Sowerbye* v. *Arden*, 1 Johns. Cha. Rep. 240.

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which he answered, "yes: but you will recollect, that I "have since given you 10,000*l.*; which has done that "away."

—— *Silverlock*, by his depositions, stated, that he was employed to prepare the settlement upon the marriage of *Mr.* and *Mrs. Antrobus*; when it was agreed, that *Mr. Crawfurd* should give 10,000*l.*, as a marriage portion; which should be accepted by her in full of all her other claims upon his estate and property; and the deponent had been before informed by *Mr. Crawfurd*, that he had given his daughter a share in the *Forth* and *Clyde* navigation; and at the time the settlement was preparing he informed the deponent, that he considered 10,000*l.* as a large portion; but it was to be in lieu of that and every other claim of his daughter under the settlement, or deed of appointment, or otherwise.

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Mr. Romilly, and Mr. Cooke, for the Plaintiff, contended, that a voluntary conveyance, defective, will be executed; if intended as a provision for a child; referring to the concluding passage in *Bonham* v. *Newcomb*, (*a*) a passage in *Coleman* v. *Sarrell*, (*b*) and the cases, where a defective execution of a power, or the want of a surrender, has been supplied.

Mr. Piggott, Mr. Whishaw, Mr. Newholt, and Mr. Heys, for the Defendants.—To induce the Court to act, to effectuate a gift *inter vivos*, there must be a valuable, or at least a meritorious, consideration: *Tate* v. *Hilbert*. (*c*) In the cases of *donatio mortis causa* the Court will not interfere without delivery; the importance of which appears in that case, and *Miller* v. *Miller*, (*d*) and *Ward* v. *Turner*, (*e*) there cited, also in *Disher* v. *Disher*. (*f*) *Ward* v. *Lant*. (*g*) The Court has never proceeded upon a voluntary instrument, kept in the possession of the party, to perfect a merely inchoate act, that never was completed. At least the intention ought to be clear, direct, and unequivocal; and, if manifested by writing, that writing ought to have been delivered. There is no evidence, that this paper was ever in any other possession than that of *Mr. Crawfurd*. It was found amongst the papers of *Mrs. Crawfurd*, his executrix. Every presumption is against the fact of delivery. A gift without consideration is good; but is revocable before delivery. *Vent. Cept.* (*a*) There is no evidence, as to what was done with this paper after it was signed. This is the case of parent and child. Can it be maintained, that a child, finding a paper of this nature, could call upon the parent to complete a gift according to it? If

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(*a*) 2 *Vent.* 365.
(*b*) 3 *Bro. C. C.* 12. *Ante*, vol. i. 50. See 3 *Bro. C. C.* 14.
(*c*) 4 *Bro. C. C.* 286. *Ante*, vol. ii. 111. (*d*) 3 *P. Wms.* 350.
(*e*) 2 *Ves.* 431. (*f*) 1 *P. Wms.* 204. (*g*) *Prec. Ch.* 182.
(*a*) p. 42. *Vent. Cept.* 109.

no delivery is necessary, this paper would stand upon a better footing than a deed. Here is no delivery: no assertion of right: no correspondence or demand. The subsequent facts destroy all colour of title; which, if it could be supposed to have existed originally, was satisfied and extinguished upon the marriage of *Mrs. Antrobus*. These are double provisions; against which there is a general inclination: *Ayliffe* v. *Tracy*; (*b*) and a particular intention to the contrary in this instance appears by the evidence.

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Mr. Romilly, in Reply.—This advancement of a child by her father was perfectly complete. Certainly this is not an assignment: nor was that the intention. The father meant to make himself a trustee for his daughter of these shares; sensible, that she could not manage them herself; and proposing to manage them for her. This paper is therefore to be considered as a declaration of trust. These declarations, made before the marriage of his daughter, are, that he *had given*; not, that his intention was *to give*. It is not proved, that this paper remained in the possession of *Mr. Crawfurd*; or, that at the marriage it was agreed, that it should be delivered up. In the cases referred to, the party kept secret the fact, that he had executed the instrument; and the only object of retaining the possession was to preserve the power of destroying it. *Mr. Crawfurd* did not keep this a secret from his daughter and others. The doctrine as to voluntary provisions was never applied to a provision by a father for his child. The distinction is continually taken, with reference to the natural obligation; particularly in *Colman* v. *Surrell*, (*a*) the most remarkable case upon that subject.

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The MASTER *of the* ROLLS.—Do you recollect any instance, in which the party was compelled to perfect the gift, even in favour of a child?

Reply.

The relief does not require, that any act should be done: this being a declaration of trust. *King* v. *Cotton* (*b*) is much stronger than the case of a father: the mother not being considered as under the moral obligation.

The MASTER *of the* ROLLS.—I do not see, how this assignment can be decreed. The facts of this case are in great obscurity. That must operate unfavourably to the Plaintiff; for this paper comes out of the possession of the executrix of *Mr. Crawfurd*. The presumption therefore is either, that it has always remained in his possession, or, that if ever parted with, it had been delivered back to him. Upon

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(*b*) 2 *P. Will.* 64. 9 *Mod.* 3. 2 *Eq. Cas Ab.* 19. *Copley* v. *Copley*, 1 *P. Will.* 147.

(*a*) 3 *Bro. C. C.* 12. *Ante*, vol. i. 50. (*b*) p. 43. 2 *P. Will.* 674.

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the latter supposition, taken with the provision made upon the marriage, there is an end of the Plaintiff's case. Upon the supposition, that this paper never was out of *Mr. Crawfurd's* possession, a strong argument arises against this claim; for there is a probability, that having been once out of his possession, it might by the accident that has been mentioned, *(a)* have got back to his representative. Can I presume the fact of delivery? The utmost is absence of all proof. I cannot raise that presumption in opposition to the *primâ facie* inference, from the custody in which this paper was found: in which, upon the supposition of delivery and continued possession, it ought not to have been found; for upon that it ought to have been among the papers of the husband. But it does not rest merely upon the absence of evidence. Upon the answer to the cross bill it appears, that this paper could never have been delivered into the possession of the daughter; at least not subsequently to the marriage; for the conversation, relative to the gift, was after the marriage; and yet according to the Plaintiff's belief the husband remained until his death ignorant of this indorsement. The
[45] husband knowing that a gift had been made, and not knowing the fact of the indorsement, that is evidence, that the receipt with the indorsement could not have been in his wife's possession; and the presumption is, that it must have been in the possession of her father. On the other side, it is true upon the supposition, that it remained in his possession, he must have told his daughter what he had done. Perhaps he showed her the indorsement: but I should think, he went no further; and, that he never put her in the actual possession of it.

When there is a voluntary and imperfect gift of this kind, the party reserving the instrument in his own power during his whole life, is it possible after his death to inforce a specific performance of the engagement, which that instrument contains; or to inforce a legal execution of that assignment, which it purports to make; taking into consideration, that the parent did not die without having expressed an intention upon his part not to carry into execution that gift; for it is evident, that *Mr. Crawfurd* himself never would, unless compelled, have acted upon this assignment; that he never would have done any thing to perfect it; which appears from his declarations to his daughter and *Silverlock*; both purporting, that he considered this gift as completely at an end, as done away by the provision made upon her marriage. Has a case ever occurred, in which a Court of Equity has interfered to give effect to an instrument, at-

(a) This probably alluded to a representation by the bill, that *Mr.* and *Mrs. Antrobus* resided much at *Mr. Crawfurd's*; that *Mr. Antrobus* was, at the death of *Mrs. Antrobus*, in a very infirm state, and incapable of transacting business; and that her funeral was under the direction of *Mr.* and *Mrs. Crawfurd.*

tended with these two circumstances; 1st, that there is no evidence, that the parent ever parted with the possession of it: 2dly, a declared intention by him not to act upon that instrument, or to give effect to it; having died with the conception, that he was owner of the property, which he at one time intended to give away?

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* There have been some cases, in which a voluntary conveyance, kept in the possession of the party during his life, and in his possession at the time of his death, has been held to operate against his will. But in those cases there was a complete conveyance, a transfer in law, of the property: nothing requisite to add to the validity of it: the instrument permitted to remain uncancelled; and all the Court was called upon to say was, that a will, a mere voluntary act as much as the deed, should not be a revocation of the deed; that the deed should operate against the will: that is, that the Court would not deny to the deed its legal effect and operation. But this instrument of itself was not capable of conveying the property. It is said to amount to a declaration of trust. *Mr. Crawfurd* was no otherwise a trustee than as any man may be called so, who professes to give property by an instrument, incapable of conveying it. He was not in form declared a trustee: nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says, he assigns the property. But it was a gift, not complete The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case, in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is *locus pœnitentiæ*, as long as it is incomplete; and *Mr. Crawfurd* did repent: that is, he changed his mind, upon what he thought a sufficient motive; not merely from caprice; but the situation of his daughter was no longer that, under which he made this imperfect disposition in her favour. In order to have any effect, he must have been compelled to give it effect by suit in this Court. This is not a case, in which nothing was done during the life of the party, showing an alteration of intention.

Where a voluntary conveyance, kept by the party until his death has prevailed against his will, the conveyance has been complete; a transfer in law of the property.

[* 46]

[* 47]

* Where the gift is not testamentary, but is to operate *inter vivos*, except in the instance of a defective execution of a power, [illegible]e executors ever been called upon to do any act to perfect it? The ordinary case is that of supplying the surrender of a Copyhold. There the court says, the representative shall not contest the will of the testator in those particularly favoured and excepted cases. His will was, that the estate should pass. He omitted the formality that would make it pass legally: but it shall not fail, in favour of those who represent him. But this is not legatory. For that purpose probate must be obtained. I cannot therefore consider this as having any operation, that a will would

Executor never called upon to do any act to perfect [illegible] in the particular cases of supplying a defective execution of a power, and the want of a surrender of a Copyhold

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have. I do not see upon principle, how the court could have acted against *Mr. Crawfurd* himself; nor, considering his declared change of intention, how it can act against the representatives, upon the notion of compelling them to comply with his will. It was not his will. No case being cited, in which this was ever done, I do not see, how I can make the precedent. If this is to be executed now, under these circumstances, I do not see, why it should not have been executed against *Mr. Crawfurd* himself; why his daughter could not have filed a bill against him to compel him to execute a legal assignment. Has that ever been done? It would now be doing just as strong a thing: this paper having remained in his possession until his death. Unless an instance can be produced, the bill must be dismissed.

The cause was not mentioned again.

[48]

ROLLS.
1805.
May 28, 29.
Aug. 7, 8.

PALK v. LORD CLINTON.(1)

A second mortgagee, to redeem a prior mortgage, must make the heir of the mortgagor a party; though the second mortgage is only of part of the estates comprised in the first, and under a different title.

THE bill stated a mortgage by Lord *Oxford* to Sir *Edward Hughes*, of estates in the counties of *Dorset*, *Devon*, and *Cornwall*, to secure a sum of 20,000*l.*, which mortgage became vested in the executors of Lady *Hughes*. Upon the death of Lord *Oxford*, the mortgagor, these estates became separated, and went in different channels: the *Dorsetshire* estate becoming the property of *Horace Walpole*, the estates in the counties of *Devon* and *Cornwall* going to Lord *Clinton*. In 1792 Lord *Clinton* conveyed all the estates in the counties of *Devon* and *Cornwall* to trustees, and their heirs, upon trust, to raise by sale or mortgage,

Mortgagee under a trust to raise money by sale or mortgage has only the remedies of a mortgagee; and cannot call upon the trustees for execution of the trust.

Under a trust to raise money by sale or sales, mortgage or mortgages, whether the trustees, having raised the money by mortgage, can afterwards sell to pay off that mortgage, *Query*.

As to relief under the general prayer, different from that prayed specifically, and whether an amendment is not necessary, *Query*.

The plaintiff praying relief, to which he is not entitled, viz. a sale under a trust, instead of redemption or foreclosure, as a mortgagee, cannot have the different relief under the general prayer. But the proper relief may be obtained by amendment; and for that purpose another party being necessary, liberty was given to amend by adding parties, (which includes the introduction in the statement of facts consequential upon that addition,) and praying such relief as he may be advised.

(1) Cited, and remarked upon, 3 Johns. Cha. Rep. 463.

sales or mortgages, 34,000*l.*, and such other sum, not exceeding 10,000*l.*, as should be deemed by him and the trustees necessary; upon trust, to pay off a mortgage of 7000*l.*, upon other estates of Lord *Clinton*, and upon other trusts, specified by a deed of the same date; and as to the estates subject thereto, to the use of Lord *Clinton* for life; with remainders to his first and other sons in tail. 1806. PALK v. CLINTON.

Under that trust the Plaintiff, Sir *Lawrence Palk*, in 1794, lent to the trustees 25,000*l.*, upon a mortgage of estates, comprised in the trust; and covenanted within a year to advance them sufficient to make up the sum of 44,000*l.*, upon the security of the same; and did accordingly afterwards advance the further sum of 19,000*l.* The equity of redemption was reserved to the trustees. The bill prayed an account of what is due to the executors of Lady *Hughes* upon the mortgage of 20,000*l.*; also an account of what is due to the Plaintiff under the mortgage in 1794; and, that the trustees under the trust created by the deceased Lord *Clinton* in 1792, may be decreed to sell so much of the estates comprised in that trust, as will be sufficient to pay the sum that may be due upon both those accounts. [49]

The Plaintiff consented at the bar, during the argument, that so much of the bill, as prayed a sale for the purpose of raising the 20,000*l.* should be dismissed; admitting, that the trustees had no power to raise that sum.

An objection was taken by the Defendants, that Mr. *Walpole*, entitled to the equity of redemption under the original mortgage, ought to be a party.

Mr. Bicknell, and *Mr. Hart*, for the Plaintiff.—The first question is, whether the trustees have exhausted their power, so that they cannot proceed further in the execution of it.

An opinion has prevailed, that trustees, having executed their power to raise money by mortgage, cannot afterwards raise money to pay off that mortgage. But that cannot prevail, where, as in this instance, the clear import of the instrument is, that they may execute the trust at different periods. They reserved the equity of redemption to themselves; and they had power to do so. That opinion is not supported by any authority, deciding, that trustees, seised in fee for the purpose of raising by sale, or mortgage, a sum of money, and afterwards to ulterior uses, have by the act of making a mortgage so completely destroyed their power, that they can never get in that mortgage, and proceed further to execute the trust. The object in creating these trusts of great estates is to keep the estate entire, and by mortgaging to disencumber it from debts: but the consequence of this doctrine, that the power is exhausted, would be, that the family might lose the whole estate by foreclosure. If it would not be proper for the trustees to [50]

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take this step, it is competent to a Court of Equity to say, a mortgage is only a temporary pledge for a loan of money; but the object was to relieve the estate by a sale of part; and therefore the Court would reform the act of the trustees; and direct them for the relief of the estate to proceed to a sale. The object was to keep this estate, and by sales from time to time to raise 44,000*l.* The expression is "by sale or mortgage, sales or mortgages" to raise; and there is a provision, that, when the money should be paid, the trustees should have the estate revested in them, upon the trusts of the said indenture.

If the Plaintiff cannot prevail upon that point, this bill, though praying a sale, may be considered as a bill of foreclosure; and the relief, required with that view, may be had under the general prayer: *viz.* a redemption of Lady *Hughes's* mortgage, as a step towards foreclosure. A different relief from that specifically prayed may be had under the general prayer, if a case is made for it by the bill, [51] and the Defendant is not surprised, *Mr. Walpole*, who has the equity of redemption from the original mortgagor, so far from being a necessary party, might demur. There is no privity between him and this Plaintiff; who, seeking relief against another person, finds it necessary for that purpose to pay off the mortgage. When that is done, the Plaintiff will have a charge upon the estate of *Mr. Walpole*; but, till that is done, the mere intention to do it does not concern *Mr. Walpole*. There is no privity of contract, relation, or demand, between them. This Plaintiff, having at present no legal interest in the estate, has no right to call upon him to be foreclosed in favour of a third person who does not desire it. In the *Bishop of Winchester* v. *Beavor* (*a*) Lord *Alvanley* would not decide, that a great number of judgment-creditors must be parties. It is true, Lord *Alvanley* leaned against objections as to parties, as generally made for delay. In general every person interested in the account must be a party: thus to a bill by one residuary legatee against the executor the other residuary legatees must be parties. But this is not the common case of mortgagor and mortgagee: to which it is improperly compared. In the case of principal and surety, if the principal having a collateral security by mortgages, bonds, and bills, calls upon the surety, he, paying the debt, has a clear right to have all those securities delivered up to him: but to obtain that relief, it would not be necessary to bring before the Court all the mortgagors, obligors, and acceptors.

Mr. Richards, for the Defendant, Lord Clinton, an infant: Mr. Fonblanque, and Mr. Wm. Agar, for the Trustees. — This is the first instance, in which the question, as to the power to sell, has been brought into judgment; though it

(*a*) *Ante*, vol. iii. 314.

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has been discussed in opinions of Counsel. First, this Plaintiff is not entitled to a decree for a sale: 2dly, the trustees have no power to sell at the request of any person. The object was purely personal to Lord *Clinton*, the only *cestuy que trust*. The trustees having raised 44,000*l*., choosing the mode of mortgage, the trust is executed as to him. He, the only *cestuy que trust*, received all the benefit intended for him: and could not ask the trustees to do more. This was not a trust for creditors; but a family transaction: Lord *Clinton* requiring this sum; and making himself tenant for life. No person can call for execution of a trust, in which he has not an interest. Thus under a trust for scheduled debts, a creditor whose debt is not scheduled cannot call for execution of the trust, in which he has no interest. What interest has this Plaintiff in this trust? He has a mortgage under the trustees; but is not an object of the trust. He has lent money upon the security of the estate; but is not a *cestuy que trust*. He may call upon the trustees for payment; or insist upon a foreclosure; but cannot call for an execution of the trust to raise 44,000*l*. for Lord *Clinton*: the only trust they had to execute. The question is very important, whether, a mortgagee having advanced his money to the trustees for the execution of their trust, the Court can, at the request of any person, call upon the trustees to sell, in order to pay off that mortgage; or, whether the trustees themselves, praying, that the trust may be executed under the direction of the Court, could have a decree for a sale, to pay off the money they had borrowed under a complete execution of their trust. Having used the legal estate that was in them, for the purpose of raising the money, they are *functi officio*. All the objects of the trust being completed, what trust have they left? They are [50] then bare trustees for Lord *Clinton* in tail, subject to this charge. The expression "by sale or sales, mortgage or "mortgages," is merely to give them the opportunity of raising the money at different times; as they might not be able to raise the whole at once. But they could only raise that sum; and, when that is done, nothing more remains to be performed by them.

As to the objection for want of parties, this bill prays an account, not merely of what is due to the Plaintiff, but also of what is due under the mortgage to Sir *Edward Hughes*. How can that money be paid without having the person, entitled to the equity of redemption, before the Court? Lord *Clinton's* estate is liable only to a proportion of that sum. The decree must be entire; not by piece-meal. It is immaterial, how the equity of redemption is reserved. The trustees had only a right to redeem; and the redemption

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must be for the benefit of those, for whom they are trustees. The rule is universal, not to allow an account to be taken in the absence of any person interested in it, who is forthcoming, and can be made a party. Is the estate to be eaten up by different accounts? The Plaintiff deriving title through Lord *Clinton*, there is privity between them. The Plaintiff, to the extent of his mortgage, is a purchaser, and the representative of Lord *Clinton*, and has therefore a right to call on *Mr Walpole* as to his proportion. In the *Bishop of Winchester* v *Beavor*, (a) Lord *Alvanley*, averse as he was to objections for want of parties, acknowledged the general practice, and directed the encumbrancer in that instance to be made a party. *Fell* v *Brown* (b) is decisive upon
[54] this point. Then, can this bill be turned into a bill of foreclosure, having been always treated as a bill for a sale? Relief, prayed under the general prayer, must be consistent with the case made. The universal practice is to pray relief specifically. There is no instance of trusting to the general prayer. The expression, that relief may be had under the general prayer, must be understood with this qualification, that, if the relief cannot be given directly, as prayed, the Court will for the sake of justice assist the particular prayer under the general prayer. but there is no instance of giving, under the general prayer, relief, directly contrary to that prayed particularly, though it might be consistent with the case made, with the single exception of an information by *The Attorney-General*, suing on behalf of the public (a). The Defendants come prepared to meet the relief, particularly prayed, upon the facts stated.

Mr Alexander, *in Reply*.—The ordinary opinion has been, that a trustee, having executed the trust by mortgage, cannot afterwards sell. But this is a very different case. If this mortgage cannot be raised out of the estate of the children, it is the debt of the late Lord *Clinton*, and the consequence is, that his object to raise the money for his own benefit has totally failed, and his children will take the estate disencumbered. It must have been understood, that sooner or later the trustees were to raise it by sale, having first raised it by mortgage: otherwise the nature of the instrument is completely altered, and the effect is, that the estate, which was to be the fund for this debt, becomes a mere collateral security: the personal estate of Lord *Clinton* is deprived of the advantage proposed for him: the sum of 14,000*l* is disposed of in a way, that was not intended, and some parties get what they were not intended to have. How were the trustees, to make the equity of redemption available, but by raising money by sale, to pay the debt by mortgage? It must

(a) *Ante*, vol. iii. 314. (b) 2 *Bro. C. C.* 276.
(a) p. 54. See *ante*, vol. xi. 247.

have been so understood. That is the only way, by which the estate could be made to bear that burthen, which is the whole object of the arrangement. Then is not the Plaintiff entitled to a decree under the prayer for general relief; though he has not put it in the alternative? If the case is distinctly stated, I do not know, that a prayer for general relief would not do: though I do not know an authority for it. The Plaintiff asks an account of what is due under the mortgage to Sir *Edward Hughes*; a redemption of that mortgage, and an assignment of the securities to him; and, as to the 44,000*l.*, an account of what is due under the Plaintiff's mortgage; without any declaration as to a foreclosure in the present instance; reserving further directions. He could not file a bill against *Mr. Walpole*, to compel him to disencumber the estate. In the common case, the only remedy a second mortgagee has, is to redeem the first; not to compel the mortgagor to pay the money, and the first mortgagee to receive it.

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The MASTER *of the* ROLLS.—The first question is, whether the Plaintiff has any right to the relief he seeks against the trustees? For the Defendants it is contended, that, having raised 44,000*l.* by mortgage, they are *functi officio* with regard to their trust: which was to raise that sum by sale or mortgage; they have raised it by mortgage; and therefore the trust, as far as respects them, it is said, is completely performed. Without entering into the question, how far it was competent to the trustees to make a sale, either of their own authority, or by that of the owner of the estate, if he was not an infant, for the purpose of paying off the mortgage, this Plaintiff has no right whatsoever to call upon them to sell, in order to pay him. He is no object whatsoever of the trust, further than as that trust enabled the trustees to make him a good mortgage. When he has that, he is in the ordinary situation of a mortgagee. He gets nothing more than that. He has all the remedies, but only the remedies, of a mortgagee. All the other objects of the trust are foreign to him. He has nothing to do with them. I may say, that it is at least very doubtful upon the true construction of this deed, whether the trustees could make a sale, after they had raised the money by mortgage. But it is not necessary to give a direct opinion upon that point; as, if they choose to resist the Plaintiff's demand, he has no right to compel them to try, whether they can or cannot procure a purchaser, to take such a title as they can make him under this trust-deed.

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As to Lady *Hughes's* mortgage, it was not an object of the trust-deed to raise money for that. By a deed, execut-

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ed by Lord *Clinton* and the trustees on the same day as the deed of trust, the purposes, to which the sum of 34,000*l.*, part of the sum of 44,000*l.*, is to be applied, are specified and determined: the sums appropriated to particular specified uses: part to be applied in the purchase of other estates. There is no notice in that deed of Lady *Hughes's* mortgage, except one passage. Provision is made, that 7000*l.* out of the 34,000*l.* shall be applied in discharging a mortgage, then vested in *Perrin*, upon some estates of Lord *Clinton* in *Cornwall*; and then provision is made, that, when that mortgage is paid off, and, when the trustees [57] shall have paid off the said principal sum of 20,000*l.*, or such part thereof as the premises are liable to, then they shall convey the premises to such person as shall advance the 34,000*l.* and the other sum of 10,000*l.*, as a further security for the repayment thereof. That is the only way, in which the mortgage of 20,000*l.* is mentioned in that deed. No sum is set apart for it: but, if the trustees can find means of paying it off, to secure the lender of the 44,000*l.*, he shall have those premises conveyed to him, as well as those, upon which the sum of 7000*l.* was secured. That is rather inaccurate; for the mortgagee would already have in mortgage the premises comprised in Lady *Hughes's* mortgage; and I do not see, what advantage he was to derive from that provision as to those premises; though as to those, upon which the 7000*l.* was secured, which were distinct estates, he would have an advantage. In the release, as to the trust of the 44,000*l.*, the only mention of the sum of 20,000*l.* is a proviso, that the trustees may, out of the fines to be received upon leases, pay the interest upon the sum of 34,000*l.*, and the further sum of 10,000*l.*, and also upon the 20,000*l.*, or such part thereof as these estates may be liable to pay.

I have said, the Plaintiff is not entitled to a sale, in order to raise the sum of 44,000*l.*, or the 20,000*l.*: clearly not as to the latter. There is no contract between the Plaintiff and the trustees relative to it. The only prayer of the bill, being, that the trustees shall be directed to sell for the purpose of paying these two sums, one should suppose, it ought to be dismissed. But the Plaintiff contends, that, though the specific relief prayed should be denied, yet it is competent to him under the statement of the bill to ask other relief at the bar; and he desires, that at least he may redeem Lady *Hughes's* executors, and have an account of what is due to him from Lord *Clinton*. It is objected against that prayer, that this bill was not framed for the purpose of obtaining such relief; but, if it was, there are not sufficient parties.

The question as to parties seems naturally the first to be disposed of; for, supposing it necessary to introduce other parties, it would be competent to them again to argue that

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point; whether upon the bill, as framed, such relief could be had against them. Without giving any opinion at present, how far upon this bill, as it is, such relief could be given, I think, it cannot be obtained in the absence of *Mr. Walpole*, the owner of part of the mortgaged premises. However, I give that opinion with considerable diffidence; as it is in opposition to that of gentlemen of great experience in the practice of the Court; who say, it is impracticable to introduce *Mr. Walpole*, as a party in the cause. Supposing, the Plaintiff stopped with praying the first relief I have mentioned, *viz.* the redemption of Lady *Hughes's* mortgage, it is admitted, that such a decree for a redemption by a second mortgagee of the first mortgage would be very unusual, without having the mortgagor before the Court. As far as it is possible, the Court endeavours to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all the parties interested in the estate. It is not necessary now to enter into the question in the *Bishop of Winchester* v. *Beavor*, (*a*) whether it is necessary to make all encumbrancers parties. The question here is, whether you can proceed without the mortgagor. I always understood that, before you can agitate the question of redemption as between two mortgagees, the mortgagor shall be a party. In *Fell* v. *Brown*, (*b*) that is laid down as Lord *Thurlow's* understanding * of the practice; which was very inconvenient in that instance, the heir being out of the jurisdiction: yet in his absence Lord *Thurlow* would not decree redemption against the first mortgagee; saying, the natural decree is, that the second mortgagee shall redeem the first mortgagee; and that the mortgagor shall redeem him; or stand foreclosed; and he never knew a decree, that was not so perfected. That is the expression: that appears to be a rule of long standing, for in Lord *Nottingham's* manuscripts I see a case, *Woodcock* v. *Mayne*, in which it was held, that a second encumbrancer could not file a bill to redeem prior encumbrancers without the mortgagor: the very same doctrine in express terms.

As far as possible the Court endeavours to make a complete decree, embracing the whole subject, and determining the rights of all parties interested in the estate. (1)

As to the necessity of making all incumbrancers parties, *Query*.

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But it is said, that though it is so in the ordinary case, where all the mortgagees derive from the same mortgagor, yet a difficulty occurs here from this circumstance; that this Plaintiff derives nothing from one of the mortgagors, *Mr. Walpole*; that there is no privity between them; and the Plaintiff has no right to bring him into Court. The right to bring him into Court is a necessary consequence of the right to redeem a mortgage upon his estate. The Plaintiff

(*a*) *Ante*, vol. iii. 314. (*b*) 2 *Bro. C. C.* 276.

(1) *Haines* v. *Beach*, 3 Johns. Cha. Rep. 459.

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insists, that he has the right to redeem the whole of Lady *Hughes's* mortgage; not only so far as it affects the estate of Lord *Clinton*, the Plaintiff's mortgagor; but also, as it affects the estate of *Mr. Walpole*. Then they will have a right to call upon him to attend the account; and when that is taken, and the Plaintiff has redeemed Lady *Hughes's* executors, to call upon *Mr. Walpole* to pay off the amount, or be foreclosed. It is now clearly settled, that a subsequent mortgagee must redeem the entire mortgage of a prior mortgagee. There would be some ground for the objection, if the Plaintiff might redeem Lady *Hughes's* executors by parcels; so much as affects the estate of his mortgagor Lord * *Clinton*. But that is not competent to him. He must redeem them altogether, or not at all. He must pay off the whole sum; and put himself completely in their stead; and then he has a right to consider *Mr. Walpole* as his mortgagor. The same law, that gives him the right to call upon Lady *Hughes's* executors to convey an estate, with which he has no connexion, imposes upon him the duty, as well as gives him the right, to call upon the owner of that estate to be a party.

Subsequent mortgagee, redeeming a prior mortgage, must redeem it entirely.

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It is said, he will contend, that the Plaintiff cannot call upon him for any of the purposes of this cause. Supposing it framed to embrace that object, a material interest in him, he is not a stranger to the account; which is an account of a debt due by him; for that is the first purpose, for which he is to be called into the cause. The Plaintiff says, he is about to pay the debt, due by *Mr. Walpole*, and from his estate. *Mr. Walpole* cannot say, he is a stranger; and, that it is immaterial to him, what the amount of that debt is. He has unquestionably an interest in that respect; and still further, upon the ulterior demand of the foreclosure of his estate, if the debt is not paid. See the inconvenience of the contrary course. Lord *Clinton* is before the Court. The account is binding upon him, but not upon *Mr. Walpole*. This is a plain account: but suppose an intricate and doubtful account; which, attended to by that party, might produce a different balance from that which would be the result, if it was not taken with the same attention as that party would give to it. Suppose it taken, so as to bind Lord *Clinton* and afterwards *Mr. Walpole* is called upon in a subsequent proceeding: the account must be repeated against him. Suppose, then, it is more favourable to the mortgagor: how is the ultimate decree of redemption to be framed? When both the owners are before the Court, the decree will be, that upon their paying the money the prior mortgagees shall convey the estate; and in default of payment they shall be foreclosed. Suppose there are two accounts, giving different results; what sum are they to pay? That would be a very embarrassing situation. There is good sense in saying the mortgagor shall be before the Court;

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and, if any, that all those, who are mortgagors of the same estate, shall be before the Court; for there is no such incongruity in holding, that in the absence of any mortgagor the account may be taken between the first and second encumbrancers, as in holding, that in the absence of a mortgagor of a part, the account shall be taken against another mortgagor of a part. These are both parts of the original mortgage, that must be redeemed or foreclosed together. Such an account must be taken as that one decree can be pronounced against them. There is therefore a clear necessity of having *Mr. Walpole* before the Court, as well as Lord *Clinton*.

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If, to avoid that, it is said, Lord *Clinton* shall be considered no party at all to Lady *Hughes's* mortgage, the bill must be dismissed as against him; for there is nothing to pray: but it would be a mere case as between first and second mortgagees. But I have said, by the course of the Court such a decree as that ought not to be made. If such a decree was not made by Lord *Thurlow*, where there was an obvious inconvenience, why should I make it in a case, where there is no inconvenience resulting to the party from the necessity of bringing all the mortgagors before the Court? This was my original opinion; to which upon turning it over in my mind I adhere; but with considerable diffidence, on account of the declaration of the Counsel as to the great difficulty of bringing *Mr. Walpole* before the Court. I do not see that difficulty; and the settled rule of the Court requires, that I should not make the decree prayed by the Plaintiff, either for the payment of the money, or the redemption of the prior mortgagee.

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For the Plaintiff liberty was then desired to amend generally; which was much resisted by the Defendants; insisting, that the Court would not, after issues had been joined, much less at this period of the cause, permit the issues to be varied; and that even the prayer could not be amended to the extent of praying new relief: *viz.* a foreclosure, instead of a sale. The object of the bill, in the judgment of the Court, failing entirely, the cause cannot now be recast, and shaped differently; which is against principle and practice; leading to much additional litigation; and the costs of the day by no means satisfy the expense.

The MASTER *of the* ROLLS.—In *Cook* v. *Martyn* (*a*) Lord *Hardwicke* says, the prayer for general relief is sufficient; though the Plaintiff should not be more explicit in the

(*a*) 2 *Atk.* 2

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prayer of the bill: but as in that case general relief was prayed in one part of the bill, and particular relief in another, it stood over to be amended upon paying the costs of the day. So far it is an authority against making the decree without an amendment. Suppose this Plaintiff had only prayed general relief, framing the bill, just as it is: would not the relief, adapted to his case, be redemption or foreclosure? (1) In *Cholmley* v. *The Countess of Oxford* (*b*) it is stated, that praying relief against a mortgagee is the same thing as praying to redeem; for redemption is the proper relief; and if upon a reference to see what is due, they do not redeem, the Court will, upon the application of the mort-
[63] gagee, dismiss the bill as against him; which is equivalent to decreeing a foreclosure. To the extent of allowing you to alter the prayer, I have no objection: but I can find no authority for amending the bill generally.

For the Plaintiff.—The object is only to adapt the prayer of relief to *Mr. Walpole.*

The MASTER *of the* ROLLS.—Has that ever ever been done? At one period the want of a party was fatal. That is not so now. But has the Court gone further than this; that, if the bill will do with the addition of that party, the suit may go on.

For the Plaintiff.—The application is, not to vary the bill as against those parties in any respect, but merely to pray against *Mr. Walpole* what the circumstances in this bill will entitle the Plaintiff to pray, without reference to the other parties. This point was decided by Lord *Rosslyn* in *Beaumont* v. *Boultbee.* (*a*) When publication had passed, the relief prayed specifically was thought not to be that, to which the Plaintiff was entitled, being contracted to an account from the year 1790, for instance. He therefore applied for liberty to amend, by adding an additional prayer of relief. That was resisted upon the ground, that the answer put in was applicable to that specific prayer. After much discussion Lord *Rosslyn* decided, that it was competent to the Plaintiff to amend, by adding that additional prayer. The distinction is, that after publication the Plaintiff cannot amend by inserting new facts; but may amend the prayer,
[64] where the case made would entitle him to relief more specific, or extended than is comprised in the original prayer. In this case no witnesses were examined. Liberty to amend, by bringing a new party before the Court, must include such statements of fact as may enable the Court to

(*b*) 2 *Atk.* 267. (*a*) *Ante*, vol. v. 485. Vol. vii. 599.

(1) See *Wilkin* v. *Wilkyn*, 1 Johns. Cha. Rep. 111.

act with regard to that party. Suppose an amendment, by bringing before the Court another person liable: that must include the statement of the probate of a will, for instance, a prayer of relief out of the assets, &c.; not stating any new fact as to the original defendants; but stating those facts as to the new Defendant, with a view to make the bill appropriate as against him. The principle of that decision in *Beaumont* v. *Boultbee* is, that it was, not putting a new fact in issue, but letting the prayer operate as to the facts already in issue.

1806.

PALK v. CLINTON.

For the Defendants.—That was merely an extension of the relief originally prayed: this is the substitution of relief of a different nature.

The MASTER *of the* ROLLS.—The object is to vary the prayer of relief against all the parties, by praying a foreclosure instead of a sale. That alteration in *Beaumont* v. *Boultbee* was very strong. I have not yet delivered any opinion, whether this prayer is, or is not, sufficient to entitle the Plaintiff to the relief, to which he thinks himself entitled. Then the question is premature; under the apprehension, that it may be determined against him. Ought I to do any thing more than merely deliver my opinion, that the relief prayed cannot be had? Then, if you pray other relief, there are not competent parties for that. Should I do more than give leave to add parties? I have doubts upon the [65] first question, whether the prayer is, or is not, sufficient, as it stands; for, if, upon the statement of the bill, I had examined the deed, without looking at the prayer, I should have concluded, the prayer would have been to redeem the first mortgage; and, that the mortgagor might redeem the Plaintiff, or be foreclosed. But the bill has a different prayer. The question then is, may the Plaintiff entirely neglect and pass over the prayer he has made; and desire a decree upon the statement he has made of his own case? If he may, if a Plaintiff may of course abandon his prayer, and desire a decree according to his case, Lord *Hardwicke's* difficulty in consequence of a prayer for specific relief, different from that to which he conceived the Plaintiff to be entitled, could not have occurred. There is great force in the objection, that it would lead to great additional litigation. Parties would draw their bills with very little caution; knowing, they might alter them. In many cases it is as much upon a Defendant to look to what is prayed against him, as to what is stated. On the other hand, I was led to suppose from the case *(a)* before Lord *Hardwicke*, that it was in no instance to be permitted to vary the specific relief. Upon that impression, and the precedent, I was dis-

(a) Cook v. *Martyn.* 2 *Atk.* 2

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posed to permit the Plaintiff to vary his prayer; not extending it to any variation in the body of the bill further than he might upon the mere permission to add a party; if it was consequential upon that to add to the bill what was necessary to make the case and decree consistent with the addition of that party. No permission is necessary to introduce such facts as are consequential upon that. But, if the Plaintiff thinks his bill imperfect, and further statement is necessary, I doubt, whether the permission would answer his end; for it is hardly possible to separate the cases; so that the other Defendants shall not be affected with what is [66] prayed against *Mr. Walpole*. He is a party in the mortgage; and what is prayed against him must be prayed against Lord *Clinton*. *Mr. Walpole* does not stand in that detached situation, that admits his being merely added as a party, with a prayer against him, detached from the other parties. Under that doubt perhaps it would be better to submit to a dismission of the bill, and to file another.

The Plaintiff's counsel expressing their readiness to take such order as the Court would grant, *The* MASTER *of the* ROLLS said, they should have liberty to amend generally, by adding parties; and they might pray a redemption or foreclosure in the alternative; observing, that the principle, upon which this was granted is, that it is the relief, to which the plaintiff is entitled. The decree, as finally pronounced, was, that the Plaintiff should be at liberty to amend, by adding parties, and praying such relief as he might be advised.

Feb. 28.

NORRIS v. KENNEDY.

Special order upon circumstances for time to answer without first obtaining the usual order.

UNDER the special circumstances, that there were considerable amendments to the bill, and the Defendants were Assignees of a Bankrupt who was out of the kingdom, a motion was made for time to answer until the first day of *Easter* Term; the usual orders for time not having been made.

The Solicitor-General, for the Plaintiff, opposed the motion; conceiving the practice to be (though with some doubt upon it, as no instance could be found) that before [67] special application the regular orders for time should have been obtained; in order that the Defendant may come under Lord *Rosslyn's* order (*a*).

(*a*) General Order, 23 *Jan.* 1794, 4 *Bro. C. C.* 544.

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MORRIS v. KENNEDY.

Mr. Wetherell, in support of the Motion, observed, that there would be an inconsistency in first getting the Defendant under that order, and then making an application for further time.

The Lord CHANCELLOR said, the application was reasonable under these circumstances; and, therefore, unless the practice was against it, the order should be made.

RANDALL v. MORGAN. (1)

ROLLS. 1805. *Dec.* 12. 16.

Construction of a letter; as not amounting to an absolute agreement to give a marriage portion. Another letter, subsequent to the marriage, authorizing the husband to draw for interest, due on a bond, which was never executed, could not prevail as evidence of a promise; which, if subsequent to the marriage, was void, as *nudum pactum*; and a previous promise not being shown; if that, by parol, with a written recognition after the marriage by writing, would do within the Statute of Frauds.

AN exception was taken by the Defendant, *Philip Godfrey*, to the Master's report, for not allowing the sum of 2000*l.*, claimed by him as a debt from the testator's estate, under the following circumstances.

By a letter, dated the 30th of *September* 1792, previous to the marriage of *Godfrey* with *Mary Crooke*, a natural daughter of the testator, in answer to an application by *Godfrey*, respecting the fortune he was to receive with his wife, the testator expressed himself in the following manner:

"You have already had my sentiments in the letter I "wrote you from *St. Kitt's*: and nothing has arisen* since "that period to induce me to alter my opinion. The addi- "tion of 1000*l.* 3 *per cents.* stock, is not sufficient to induce "me to enter into a deed of settlement. Whether *Mary* "remains single or marries, I shall allow her the interest "of 2000*l.* at 4 *per cent.* if the latter I may bind myself to "do it and pay the principal at my decease to her and her "heirs."

Another letter, dated the 25th of *July* 1793, soon after the marriage, from the testator to *Mrs. Godfrey*, contained the following passage:

"*Mr. Godfrey* may draw immediately on *James Akers*, "at 30 days sight, for 40*l.*, the half year's interest due on "my bond for 2000*l.*, which became due on the first of this "month."

The testator died upon the 26th of *October* 1799.

Godfrey, being one of the executors, by his examination stated, that both before and after his marriage the testator promised to execute a bond to him for payment of the sum of 2000*l.*, with interest at 4*l. per cent. per annum*, during the life of the testator, as a marriage portion; and the De-

(1) Cited, and remarked upon, 3 Johns. Cha. Rep. 490.

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fendant married on the faith of such promise; and settled the sum of 2000*l.* *Old South Sea* Annuities on his wife, and the issue of the marriage: but the testator never did execute the bond; though he considered himself liable thereto, as appears by the letter of *July* 1795, and during his life he regularly paid the interest of the said sum of 2000*l.*, at 4 *per cent. per annum*, to the Defendant, up to the first of *July* 1798.

Lady *Durrant*, by her affidavit stated, that she frequently heard the testator say, he paid the Defendant *Godfrey*, [69] the sum of 40*l.* half yearly, the interest of 2000*l.*, which he (the testator) had promised *Mr. Godfrey* on his marriage; and, that he would give *Godfrey* his bond for that sum, until he had it in his power to pay the same, and one day, in 1795, the testator's mother, who the deponent understood, had received a letter from *Godfrey*, begging her to ask the testator for some interest due on the said promised bond, said to him "*Charles*, why don't you at once give him your "bond, or pay him the 2000*l.*," when the testator answered, "Well, well, I will do it."

Mr. Romilly, *and Mr. Wingham*, *in support of the Exception.*—This Court would have compelled a settlement according to the letter, previous to the marriage. The construction of marriage-contracts is liberal, above all others. Upon that subject a loose note or memorandum is sufficient to bind: *Bird* v. *Blosse*, (*a*) *Wankford* v. *Fotherby*, (*b*) *Hammond* v. *Mordaunt*: (*c*) a case frequently cited, and insisted upon as the most modern case, *Luders* v. *Anstey*: (*d*) in which the performance of a proposal in a letter was decreed. This case is infinitely stronger. The letter in that was not so certain as this is, from the expression, "I may bind myself." The phrase, "I have proposed," by which *Lord Kenyon* bound *Mr. Anstey*, did not import an actual agreement: but his Lordship held, that after a proposal of this nature, the marriage following, he should expect a specific dissent, and should hardly be satisfied with any dissent, except some sort of new settlement: otherwise it must be presumed, that the marriage took place upon the faith of that proposal.

[70] *Mr. Richards*, *Mr. Thomson*, *Mr. Fonblanque*, *Mr. Martin*, *and Mr. Bell*, *for the Report.*—What the Defendant *Godfrey* himself says, is not evidence. The expression, "I may bind myself to do it," must, by construction, extend to the principal. He refuses to engage with the person, making the proposal. In *Luders* v. *Anstey* the expression was that he *had* proposed; and the marriage

(*a*) 2 *Vent.* 361. 1 *Eq. Ca. Ab.* 22.
(*b*) 2 *Vern.* 322. 1 *Eq. Ca. Ab.* 22.
(*c*) 2 *Vern.* 200. 1 *Eq. Ca. Ab.* 22.
(*d*) *Anst.* vol. ii. 501. Vol. v. 217.

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was considered as an acceptance of the proposal, by which the agreement was concluded. This letter leaves it entirely at the discretion of the party. The conversation, subsequent to the marriage, shows a floating intention; but, at the same time, proves that the act was not done. An undertaking in writing to pay, in consideration of a marriage, to be had, was necessary by the Statute of Frauds. (*a*) The inference in this case is, that no such engagement took place previously to the marriage, and the testimony subsequent to the marriage, amounts to nothing more than an honorary obligation, not having a legal effect; that, if he should approve the marriage, *Mrs. Godfrey* should have the principal of that sum, the interest of which, whether she married or not, he intended for her. This letter cannot in any way be considered as a promise, containing a rejection of the proposal: that in *Luders* v. *Anstey* (*b*) was something like a specific proposal. The terms were understood. In *Douglas* v. *Vincent* (*c*) the Court would not decree the payment, but left it to Law.

Mr. Romilly, in Reply.—The agreement, or evidence of it, must be in writing, and the question is, whether in this case there is not evidence in writing of an [71 agreement. If a letter subsequent to the marriage, alone executed, and contained sufficient evidence of an agreement, previous to the marriage, that agreement would be enforced; for it is not necessary, that the agreement should be in writing; but the evidence of it must be in writing, as well in the case of marriage, as of a purchase. The true grammatical construction of this letter is to read the words "if the latter I may bind myself to do it," as if they were in a parenthesis; not, as they are represented, referring to the principal, as well as the interest; for which the word "*to*" should be inserted before "*pay*." But if that is ambiguous, the second letter removes all doubt. Declaring, that in all events, whether she shall be single, or married, he will allow her the interest, and pay the principal at his decease, can it be supposed, he intended to leave all at his discretion? An expectation is held out, that the fortune shall amount to a particular sum; which is sufficient; and a promise is not necessary. Upon the second letter the testator appears to have considered it, as if he had actually given his bond.

The MASTER *of the* ROLLS.—It appears, that the Defendant *Godfrey* made his first claim, as for a debt due to him upon the testator's bond. It is now admitted, that he neither has, nor ever had, a bond for the sum of 2000*l*. The question is only, whether he is a creditor by simple con-

(*a*) Stat. 29 Ch. II. c. 3. (*b*) *Ante*, vol. iv. 501. Vol. v. 213.
(*c*) 1 Eq. Ca. Ab. 43. 2 Vern. 202.

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[*72]

tract for that sum. By the Statute of Frauds (a) an agreement in consideration of marriage, to be effectual, must be in writing. The Defendant, aware of that, contends, * that he had such an agreement; and he produces the letter, dated the 30th of *September* 1792: which he contends constitutes an agreement, to give a portion of 2000*l*. There are passages in that letter, which, if they were detached from it, and could be considered by themselves, would amount to an agreement. But there is no agreement whatsoever upon the whole letter, taken together. Some previous correspondence had passed, relative to a settlement upon the intended marriage; and the testator, referring to that, says, "the addition of 1000*l*., 3 *per cent* stock is not sufficient to induce "me to enter into a deed of settlement."

It would be surprising afterwards to find, that in this very letter he had become bound to make a settlement; or to give a promise, which would be as binding upon him. Upon the subsequent passage of that letter it is contended, that his doubt, whether he should, or should not, bind himself, relates to the whole, that is, both to interest and principal. On the other side it is contended, that the words, "if the latter "I may bind myself to do it," should be read, as if they were in a parenthesis; in which case the passage would amount to an absolute engagement to pay the principal at his death; with a doubt, whether he would bind himself to pay the interest during his life. But it is clear, he means to reserve it entirely within his own power, to bind himself, or not, as he might think fit, after the marriage should have taken place. He professes, indeed, a resolution, a determination, on which he means to act; but it is one which he keeps in his own power; the execution of which is to depend entirely upon himself; and he resolves not to put it in the power of any other person to compel him to comply with that, which seems his determination. If the other con-

73] struction should prevail, he would be making a settlement in the most disadvantageous way, on his side, without stipulating for any settlement by the husband; though just before he had declared, that the settlement, offered by the husband, was insufficient to induce him to make any settlement. This letter therefore is no agreement.

Then the letter after the marriage, addressed in the inside to *Mrs. Godfrey*, but directed to her husband, does not purport to be a promise of any kind, and it is admitted, that no bond existed. But it is evident, that the testator conceived himself to have come under some previous engagement, by virtue of which he was then acting: some engagement which he conceived equivalent to a bond; and therefore he treats it so. Probably a promise was given

(a) Stat. 29 *Ch.* 2. c. 3.

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by him to make a bond. A promise, if there was one in this letter, to give a bond, or pay a sum of money, would have been *nudum pactum*, without consideration; and the performance could not have been enforced. (*a*) As evidence of a promise already made, the letter does not ascertain to what promise it relates; or, when the promise was made; whether before or after marriage: if after, such a promise also would be *nudum pactum*, and this recognition would not give it validity. Supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely, whether that would be sufficient to entitle the Court to construe this into an acknowledgment of a debt, for, the promise being in itself a nullity, producing no obligation, a written recognition, after the marriage, would give it no validity. Otherwise the construction of the fourth section of the Statute would be just the same as the seventh; which requires only, that a trust shall be manifested by writing.

[74]

Distinction between the fourth section of the Statute of Frauds, requiring the agreement to be in writing, and signed by the party to be charged, and the seventh section, requiring, that the trust shall be manifested, not that it shall be constituted, by writing. (1)

Upon that clause it is not necessary that the trust shall be constituted by writing. It is sufficient to show by written evidence the existence of the trust. But the fourth clause requires the very agreement to be in writing, and signed by the party to be charged therewith.

To raise that question, however, the letter must be shown to have a reference to some promise before the marriage; which is not shown. I have stated, that what did pass before the marriage in writing, does not constitute an agreement. Possibly something passed between them by parol, after that agreement, with reference to which the testator speaks so positively as to paying the 2000*l.* and interest. Then the parol evidence of Lady *Durrant*, besides that it is inadmissible, proves nothing but a parol acknowledgment of an antecedent promise to give a bond; which is nothing. There are *dicta*, that a settlement after marriage, reciting a parol agreement before marriage, is not fraudulent, against creditors, provided the parol agreement had actually existence. But I do not know that the point has been directly decided. It was discussed in *Dundas* v. *Dutens*; (*a*) but Lord *Thurlow*, though inclined, that it should stand good, said, it was a mere matter of curiosity, if the first point was against the Plaintiff; as it was. A case in *Levinz* (*b*) is

Whether a settlement after marriage, reciting a parol agreement before marriage, which had actual existence, can stand against creditors. (2) Quere.

(*a*) See *Pillans* v. *Van Mierop*, 3 *Burr.* 1663. *Runn* v. *Hughes*, 7 *Term Rep.* 350, *n.* 1 *Fonb. Tr. Eq.* 342.

(*a*) p. 74. *Ante*, vol. 1 196. (*b*) See *Ralph Bovey's* Case, 2 *Lev.* 146.

(1) *Moran* v. *Hays*, 1 Johns. Ch. Rep. 342.

(2) See *Reade* v. *Livingston*, 3 Johns. Ch. Rep. 481, and the *English* cases cited by the Chancellor.

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there referred to: a *dictum*, not a decision, that the settlement was void; for though a parol promise before marriage was proved, and a settlement made after the marriage, * yet it was not made with such a correspondence to the parol promise, as to appear to have been made in execution of it; and therefore it was held, that the Court could not connect them; but the settlement must stand upon its own footing as a mere settlement after marriage. Such a case might bear a little by analogy upon the present; supposing this a recognition of a parol promise before the marriage. But that does not exist here. It does not appear, at what time the parol promise, which is implied, was made. Therefore I concur with the Master, that *Mr. Godfrey* has not made out his claim.

[* 75]

Exception over-ruled

SANSBURY v. READ.

ROLLS. 1805. *Dec.* 18.

Construction of an obscure will: 1st. That the income only, not the capital, was disposed of: 2dly, that the disposition was in favour of the younger children; excluding the eldest.

A legacy, not as an independent bequest with a time for payment, or distribution, appointed afterwards, but the time annexed to the substance of the bequest: the interests do not vest before that period.

JOHN SANSBURY by his will gave to *John Sansbury*, son of his nephew *Thomas Sansbury*, 1000*l.*, 3 *per cent.* Consolidated Bank Annuities, or as much in money as that stock will sell for, when the said *John* attains the age of 22 years. He gave to his wife's nieces, *Mrs. Pryor*, 20*l.*; *Aylce Read*, 10*l.*, and *Margaret Shepherd*, eight guineas *per annum*, to be paid to her out of the rents of a house, described, quarterly, or as the rent comes in; to whom he also gave household goods, wearing apparel, &c.; and to *Mr. Read*, his wife's nephew, 20*l.*; whom he appoints his executor in trust, and to his brother-in-law *Joseph Bridgewater*, 50*l.*, whom he appoints his other executor in trust. The will then proceeded thus:

*" No money is to be sold out of the stocks to pay these " legatees: but they must be paid out of the rents and in- " terest of mortgages, &c.; and when they are paid, togeth- " er with my funeral expenses which I desire to be paid " first, that then the income of my estate I desire may be " put into the 3 *per cent.* Consolidated Bank Annuities, " there to remain till the youngest child of my nephew " *Thomas Sansbury*, that is born of his present wife, attain " the age of 18 years, if a daughter; but if a son, then " when he attains the age of 21 years, then to be divided " among them in equal portions."

[* 76]

Then, after some directions as to his funeral, the testator proceeded as follows:

" *Margaret Shepherd* is to have the eight guineas *per* " *annum*, during her natural life, and then to return to the

"children of my nephew *Thomas Sansbury of Cawtherp* "aforesaid, that is under the age of their brother *John*."

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The bill was filed by the younger children of *Thomas Sansbury* against their elder brother *John* and the executors. Afterwards two of the younger children died.

The cause stood for judgment.

The MASTER *of the* ROLLS.—The principal question is, whether the capital, or the income only, of the personal estate is disposed of by this will. Another question is, to whom that, which the testator has disposed of, be it capital or income, is intended to be given; and the third question, at what time the interests of the persons who may be entitled under the will were to vest. [77]

As to the first question, it seems to me, that this is a disposition of nothing but income, properly so called: no words extending to the *corpus* or capital. This could never be a disposition of leasehold estate; of which a considerable part of this property consists. It would be perfectly absurd to say, a leasehold estate, which the testator has not directed to be sold, should be invested in the 3 *per cents*. The consequence is, that as to the capital the testator is dead intestate.

2d Question.—Upon this will, to whom the income is given, is quite obscure. The testator has mentioned only the youngest daughter, or youngest son, of *Thomas Sansbury*. It was contended, that he meant the younger children in exclusion of the eldest son; and, in support of that construction, reliance is placed on the subsequent clause; directing, that *Margaret Shepherd* is to have the eight guineas *per annum* during her natural life, and then to return to the children of his nephew *Thomas Sansbury*, "that is under the age of their brother *John*." The testator had before given *Margaret Shepherd* an annuity of eight guineas, to be paid out of the rent of a house. Where a will is so very obscure, the Court must be contented with very slight circumstances for its explanation; and this seems to lead to the conclusion, that he did not mean *John*, the eldest son, to take with the younger children, having given him a distinct and separate legacy; which may account for not letting him in upon this part of his property under the denomination of income. He does appear there to confine the gift to the children under the age of *John*. The bequest, therefore, is confined to the younger children of *Thomas Sansbury*.

Then, some of those children being dead, and, as it does not appear, that the youngest child has attained the age prescribed, the third question is, whether their shares were vested. They are not. They could not vest until the youngest child attained the age prescribed; for there was [78]

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SANSBURY v. HEAD.

no substantive gift to them. The only way, in which they can claim, is under the direction to the executor, "then to be divided amongst them in equal portions." Therefore the time of the division is annexed to the very substance of the gift; *(a)* which is not an independent gift; with a time for payment, or distribution, appointed afterwards. The income must accumulate, until the youngest child attains the age prescribed. Until that period the distribution cannot take place.

The decree directed an inquiry, who were the next of kin at the time of the testator's decease; and declared, that the income belongs to the younger children, exclusive of *John*.

(a) *Batsford* v. *Kebbell*, *ante*, vol. iii. 363

ROLLS.

1805.

Dec. 18.

PILLING *v.* ARMITAGE.

Lease not decreed upon expenditure in repairs and improvements under an alleged agreement, proved by one witness: the answer containing a positive denial of the agreement; which denial was also confirmed by circumstances.

No relief upon general equity from expenditure under the observation of the landlord by a tenant, but not under any specific engagement or arrangement.

IN this cause the object of the bill was to obtain a lease from the Defendant. For that purpose the case, represented by the bill, and proved by one witness, was an agreement in 1790, by the Defendant, that in consideration of repairs and improvements of mills, situated upon the premises, the Plaintiffs should not be disturbed during the Defendant's life; and expenditure by the Plaintiffs under that agreement, to the amount of 5000*l.*, in 1794. The answer contained a positive denial of that or any other agreement or promise, previous to the year 1794; that the Defendant ever induced or led the Plaintiffs to make, finish, or complete, the said alterations, improvements, or repairs, or lay out money upon any promise or assurance of a lease for the life of the Defendant, or any other term; or upon any promise or assurance, that they should not be disturbed during his life, or to the like effect; insisting, that the only agreement took place upon the 4th of *April* 1794, in consequence of a letter, dated the 24th of *March* preceding, to the Defendant from one of the Plaintiffs: the necessary alterations and improvements being estimated at 300*l.*; and the Defendant agreeing to advance 300*l.*; to furnish wood at a reasonable price, calculated at about 100*l.*, and stone *gratis*; and to have interest at 5 *per cent.*

No relief under an agreement, stated by the answer: the bill not being adapted to that agreement; but framed upon a different ground; which failed.

The cause stood for judgment.

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MASTER *of the* ROLLS.—In this case there is a good deal of uncertainty upon the agreement itself, as it is stated by the Plaintiffs. The answer speaks of the proposed improvements. What they were, whether all that was in contemplation, or only this particular improvement of the mills, is left in some degree of uncertainty. The only witness for the Plaintiffs, *Sutcliffe*, does very distinctly prove all that the bill states, as the subject of that agreement. As far as the testimony of one witness can go, this witness distinctly proves all the allegations of the bill as to the agreement. But it is objected, that this is but the evidence of one witness; and the agreement is denied by the answer; and therefore, according to the established rule of the Court, a decree cannot be obtained. (*a*) On the other side it is said, and said with truth, that, where the answer is not as positive as the testimony of the witness, the testimony of the witness will prevail against the answer: or, supposing the answer positive, yet if the testimony of the witness is confirmed by circumstances, in that case also the testimony of the witness, so supported and confirmed, shall prevail against the answer; and it is said, in this instance the answer is by no means so positive as the testimony of the witness; that it is ambiguous; the direct denial is, that there was any concluded agreement between the parties. The Plaintiffs say, in the understanding of the Defendant there may have been no concluded agreement; yet all this may have passed; which the Court may call a concluded agreement; and he ought to have denied the conversations, alleged to have passed, and the promise, alleged to have been made. It seems to me, that though, throughout the greatest part of this answer, the Defendant speaks only of recollection and belief, with reference to the nature of the conversation that passed between him, the Plaintiffs, and the witness, in the year 1790, yet in other parts he distinctly denies the fact of having made any such promise, as is stated in the bill. He denies, that "at that, "or any other time, previous to the year 1794, he made "any agreement or promise respecting the same; and then "only as after mentioned;" denying not only any agreement, but any promise. He positively denies, that he ever induced or led the Plaintiffs to make, finish, or complete, the said alterations, improvements, or repairs; or to lay out money upon any promise or assurance of a lease for the life of the Defendant, or any other term; or upon any promise, or assurance, that they should not be disturbed

[80]

[81]

(*a*) See *The East India Company* v. *Donald*. *Ante*, vol. ix, 275; the references, *ante*, vol. vi. 177. note (*a*). *Lord Cranstown* v. *Johnston*, *ante*, vol. iii. 170.

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during his life; or to the like effect. That is perfectly inconsistent with the testimony, that he stated, as a condition to them, that, if they would lay out money in improvements, they should not be disturbed in the possession during his life. The Defendant in his second answer states, that he did not believe, know, or understand, that the improvements, which he saw, were making in faith or consequence of any agreement, promise, or assurance; he not having in fact ever made any agreement, promise, or assurance, to any effect, as in the bill stated, but as before mentioned; referring to the agreement of 1794.

As to collateral circumstances, they appear altogether in favour of the Defendant. The first observation is, that this agreement is supposed to have been entered into in *October* 1790. It is supposed to relate to mills, then in great want of immediate repair. The witness so states it. The bill alleges, that their customers were continually deserting them on account of their inability to complete their engagements; that the Defendant (and the evidence goes to the same point) was excessively anxious, that even that summer should not pass away, before the alterations were begun; and, that he directed some wood to be purchased for the purpose of beginning them. Yet it does not appear, that any step was taken towards altering or improving the mills until the middle of the year 1794; and all the period between 1790 and 1794 is passed over both by the bill and the evidence: the bill stating, that the Plaintiffs, relying upon such agreement, did in 1794 proceed to make the alterations and improvements. It is very extraordinary, that this delay should appear; and, that there should be no attempt to account for it in allegation even, still less by evidence.

[82]

Then, in 1794, we find a letter by one of the Plaintiffs to the Defendant; which, putting the evidence of the witness out of the question, is demonstration, that no such agreement took place, as is alleged: that letter making a proposition, and as an original proposition, for certain alterations and improvements in the mills; and for negotiation relative to those alterations and improvements. According to the bill and the witness, every thing had been completely settled and adjusted in *October* 1790: the Defendant was completely informed of the alterations intended, had approved them, wished for expedition; the Plaintiffs had agreed to be at the expense, and he agreed to let them be undisturbed during his life. This letter is perfectly inconsistent with the evidence; according to which nothing remained to be discussed; every thing was settled; and they proceed upon that; connecting together the alterations, begun in 1794, with the agreement of 1790; not stating any new discussion or engagement in the interval. The conclusion is, that,

if that conversation did pass, no one acted upon it; that it was not thought advisable by the Plaintiffs to make the expenditure that was in their contemplation. The very circumstance, that the alterations were not before begun, leads to that conclusion: but, when I see this letter, a proposal entirely new, with the representation of the subject, quite open to them to treat upon, it is conclusive evidence, that what was done in 1790 was departed from; and, that it was thought necessary to come to a new arrangement. 1806. PILLING v. ARMITAGE. [83]

That letter is dated the 24th of *March*; and the Defendant states by his answer, that upon the 4th of *April* an agreement took place, totally different from that of 1790, suggested: *viz.* that he would advance 300*l.*; and furnish wood at a reasonable price, and stone *gratis*; upon condition of having interest at 5 *per cent.* and the value of the wood he should furnish; which was about 100*l.*; and accordingly a rise of the rent took place from that time, which continued as long as the possession of the Plaintiffs. This agreement in 1794 is entirely passed over by the Plaintiffs. They ascribe the rise of the rent to another cause; that the Defendant did not claim any rent during the time the mills were repairing; and they agreed to pay him interest upon it a year. But that is not supported by the evidence. Then, the agreement of 1794 being proved, there would be an end of that of 1790; if it was ever so distinctly and substantially made out; for there is a total departure from it: a fresh arrangement, upon quite a different footing. I cannot attach to the new agreement, supposing it distinctly proved, the old promise; for that applied to quite a different case, in which the Defendant was to advance not a shilling, and, if he had, *Sutcliffe*, the witness, admitted, that the proper charge by the defendant would be 10 *per cent.* not 5 *per cent.* Improvements being then proposed, which the party states may cost 500*l.*, of which 400*l.* was to be advanced by the Defendant at only legal interest, would it be equitable to draw the promise from the proposition to which it applied, and to say, it must necessarily accompany every agreement, that might take place at any time between these parties: whatever may be the principles upon which that agreement proceeds? There cannot be any justice in that. [84] The promise fails; unless it was renewed, and attached to this new agreement. Of that there is no evidence whatsoever. From the nature of the case of the Plaintiffs they could not be expected to produce any evidence of it; passing by, and virtually denying the existence of this new agreement; which is however incontestibly proved to have taken place in 1794. If the improvements cannot be connected with the agreement of 1790, there is an end of the Plaintiff's case; as far as they seek to be quieted in the possession during the Defendant's life; for, if the promise either is not

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proved, or is expressly waived by the acts of the parties, they have no specific equity.

Can they then claim upon the general equity, having laid out a great deal of money in improving the mills, with the knowledge of the Defendant, standing by, seeing them go on, not objecting, or in any degree interfering to prevent them? Whatever equity might arise upon that footing would be of a different sort from that, which they could claim upon a specific engagement for a lease of a definite duration. As to that, if you disconnect the improvements from any specific engagement, upon the faith of which they were made, it is very difficult to give the Plaintiffs the benefits of those improvements: to whatever degree they may have ameliorated the estate. I would go every possible length to aid parties in obtaining reimbursement of expenditure upon another's property; of the benefit of which he has deprived them by the exercise of his legal right; determining their lease from year to year. Whatever his own breast may suggest to him, the question here is, what legal and equitable redress can be obtained.

Equity from expenditure upon another's estate through inadvertence or mistake; that person seeing it; and not interfering.

* There are different positions in the books with regard to the sort of equity, arising from laying out money upon another's estate through inadvertence or mistake: that person seeing that, and not interfering to put the party upon his guard. The case, with reference to which that proposition is ordinarily stated, is that of building upon another man's ground. That is a case, which supposes a total absence of title on the one side; implying therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected, that the party should advertise the other, that he is acting under a mistake. But I do not know any case, in which a lessee either of a term, or from year to year, making any improvement upon the estate in his possession, though with the complete knowledge of the landlord, has been held entitled as against that landlord to have his lease prolonged, until he shall obtain reimbursement for the improvements he has made; for he has a title, of which he knows the duration. He is not under a mistake with regard to the nature of his title. He may perhaps be guilty of great imprudence; if the expectation, that his lease will be renewed, or his possession from year to year will continue, prove unfounded. But, because that expectation is disappointed, can I say, he has acquired a right to a prolongation of his lease, or to a lease for a certain period? What is the information the landlord ought to be expected to give in such a case? As there is material information to be given by him in a case of decided mistake, so it might be very material information, if there is a certain lease, but bad in law; though I will not pronounce a decided opinion upon

[* 85]

As to expenditure by a tenant with the knowledge of the landlord, aware also, that the lease is bad, *Quære*

that. But what information can he give to a tenant from year to year other than he possesses: *viz.* that he is tenant from year to year, making improvements, * and laying out money, upon an estate in which he has no permanent interest. 1806. PILLING v. ARMITAGE. [*86]

I am now supposing, there was no promise by the Defendant to quiet the Plaintiffs in the possession for his life; for upon such promise, if established they must succeed: but, treating it merely as the case of improvements made in his view, that information would not have conveyed to them any thing they did not possess. Then suppose he said, it was the habit of his family to permit tenants to remain from generation to generation: but he is not sure, that he shall let every tenant remain for an indefinite period of time. That is implied from the nature of the thing; that the landlord is not bound to act upon that habit. Then could they have said, they were making improvements upon the supposition, that they were upon a footing with the other tenants? He swears distinctly, he had no such intention at any time during which the improvements were going on, to deprive them of their possession; and it was a circumstance, that occurred after the improvements were made, and totally independent of them, that induced him to deprive them of the possession. Then, what conduct is a person in that situation to hold, in order to prevent that equity attaching? I do not know what distinct obligation there is upon the landlord. Can it be said, he must have supposed they were acting upon what passed in 1790; and therefore he ought to have warned them? That is inconsistent with the whole tenor of his defence; for he denies any promise in 1790, upon which they ought to have acted; and states, that he had totally forgotten it. Also, taking the agreement of 1794 to have existence, there was a case to which he could refer the improvements; for in the nature of that arrangement is implied, that some improvements [87] should take place. At what period am I to say, he must have seen, that they were exceeding the limits of any expense, they could reasonably be supposed incurring, in consequence of the arrangement of 1794? Of course he was to see some improvements; and there was no neglect in not guarding against making those. But suppose, there was a period: it would then come back to the case of a tenant from year to year, making improvements at his own discretion, upon the hope, arising from the habit of his landlord, that it would be worth his while to take the chance; having no apprehension of being disturbed; and, I believe, that is the real truth of this case. These parties, independent of any promise, rested so much upon the faith that they should not be disturbed in the enjoyment, as their ancestors had not been for many years, that they thought themselves as safe,

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as if they had a lease. But, can I convert that hope into an actual engagement by the landlord, binding him down to permit them to continue in possession, not for a definite period, according to the agreement of 1790, but until they shall be reimbursed? See how far that would extend. The case hardly occurs of a good tenant, especially where tenants are seldom turned out, who does not make some improvement. Can a Court of Equity say, such a tenant is never to be removed, until it has been settled in Equity, how much he has laid out under the expectation that he should not be turned out, and the landlord would not exercise his legal right until reimbursement? This is a hard case upon the Plaintiffs, if they lose all this money: but, to give redress in a particular case, likely to occur rarely, am I to lay down a principle, that would shake the security of property in almost all its ramifications, and the dealings of men with each other? For that purpose I must say, that the true measure of justice is, that a landlord shall never

[88] turn out a tenant, if improvements have been made with the knowledge of the landlord, until the tenant shall be completely reimbursed.

The only possible ground is upon the footing of the agreement of 1794: but that is inconsistent with the shape of the bill. If a landlord enters into an arrangement with a tenant relative to improvements, and so completely sanctions them, as himself to agree to advance part of the money, implying, that another part is to be in advance by the tenant, I doubt, whether that does not fasten an equity upon the landlord, precluding him, when these improvements are made under his authority, from saying, there is an end of the lease. Such an arrangement, though without a specific agreement, would imply one; as it would be so contrary to good faith to encourage a tenant in so positive and direct a manner to proceed in particular improvements, and then deny him all benefit, that, I think, equity would interfere, and hold it an implied term, that the tenant should have the fair benefit from the improvements thus made by the concurrence of his landlord. But the bill is not at all framed for redress upon that ground. On the contrary they entirely pass by this agreement; and will not admit, that their improvements had the slightest connexion with it, but refer them to that of 1790.

Therefore, upon the whole view of this case, I must dismiss the bill; but certainly not with costs.

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ROLLS.

1805. *Nov.* 18. *Dec.* 19.

CURTIS *v.* PRICE.

A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed: the object of the trust terminating with that life; and a remainder following to the same trustees, upon the death of the tenant for life, for a term of years. A subsequent remainder therefore to the heirs of the body of the tenant for life held a legal estate; uniting with the legal estate for life; and vesting an estate tail, according to the rule in *Shelley's* case; not an equitable estate, capable of taking effect only as a contingent remainder. The Rule in *Shelley's* case takes effect, where an estate of freehold though during widowhood only, is given, with a subsequent limitation by the same instrument to the heirs.

THE object of the bill in this cause was to obtain the specific performance of an agreement by the Defendant to purchase an estate from the Plaintiff, which was resisted upon objections to the title.

By indentures of lease and release, dated the 3d and 4th of *September* 1725, in consideration of a marriage had between *Martin* and *Eleanor Barry*, and for making a provision for their children, and for settling a jointure upon the said *Eleanor*, in case she should survive said *Martin*, in lieu of dower, the manor and lands of *Tregett*, and the advowson to *Llanrothall*, the premises contracted for by the Defendant, were conveyed to *Richard Powell* and *John James*, their heirs and assigns, to the use and behoof of *Martin Barry*, without impeachment of waste, for and during the term of his natural life; and from and after his decease to the use and behoof of *Eleanor* his wife, for and during *the term of her natural life, if she continued sole and unmarried: and, if she should happen to marry, then to the use and behoof of *Powell* and *James*, and their heirs, upon trust, that they, or some, or one of them, should with, by, or out of the rents, issues, and profits, of the said premises, pay unto the said *Eleanor* the sum of 50*l.* yearly, for and during her life, by half yearly payments, to commence from the time of the marriage, and with all the rest of the said rents, issues, and profits, to maintain and provide for, as well the eldest as all other the children of *Martin Barry* and *Eleanor*, his wife, and for educating his eldest son, and preferment of the younger children, as they should see most convenient; and from and after the said *Martin Barry*, and *Eleanor*, his wife, their several and respective deceases, to the use and behoof of *Powell* and *James*, their executors, &c. for the term of 100 years, subject to the proviso after mentioned; and after the end, expiration, or determination, of the said term to the use and behoof of the heirs of the body of the said *Eleanor* by said *Martin*, lawfully begotten or to be begotten; and for want of such issue, to the right heirs of *Martin Barry* for ever.

It was further agreed, that in case the second, or any other, of the younger children of *Martin Barry*, should be bred a clergyman, the said advowson should be to the use of such child; and he should hold and enjoy some land, described as under the parsonage-house; and should have the

No objection under the Statute of *Hen.* 7. to fine of lands taken by a *Feme Covert ex provisione viri*; if the heir in tail joins.

A purchaser under a decree not affected by irregularities and defects in the decree, by which the application of the money may not have been properly secured.

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next presentation to said parsonage; and upon his being instituted and inducted therein, or any person in trust for him, should hold the said land as long as the said parsonage.

The trust of the term of 100 years was declared to be, that the trustees should by and out of the yearly *rents and
[*91] profits, or by leasing, demising, or mortgaging, raise the sum of 500*l.*, to and for all and every younger child or children of *Martin Barry* by *Eleanor* begotten or to be begotten, to be paid, subject to the appointment of *Martin Barry*, at their respective ages of 21, with interest and survivorship; and it was declared, that then the aforesaid term of 100 years should cease.

The testator died soon after the execution of the settlement; leaving *Eleanor*, his wife, and *William Barry*, his eldest son, and several younger children surviving. By a decree, pronounced on the 8th of *July* 1740, upon the bill of a bond-creditor of *Martin Barry*, on behalf of himself and other creditors, against *Eleanor Walter*, who was the widow of the testator, and her second husband, and *William Barry*, and the younger children of *Martin Barry*, and *Thomas Shurmer*, under whom the Plaintiff claimed, and other persons, it was declared, that the settlement, being voluntary, ought to be considered as void against the Plaintiff, and the other speciality creditors, and that articles of agreement for the sale of the estates, comprised in the settlement, except the next presentation to the church of *Llanrothall*, should be carried into execution. An account was directed of the mortgages; and payment out of the purchase-money; and the reconveyance to *Shurmer*; and that out of the remainder of the purchase-money the Plaintiff and the other speciality creditors of *Martin Barry* should be paid: and by the consent of *William Barry* it was directed, that the sum to be raised under the settlement for the younger children, after the death of *Eleanor Barry*, should be retained by the purchaser, to be paid to them at the age of 21; and that the residue of the purchase-money should be paid to *William Barry*; with the usual direction,
[92] that two of the children, who were infants, should join in the conveyance; unless after coming of age they should show cause against the decree.

By indentures of lease and release, dated the 31st of *October* and 1st of *November* 1740, for the considerations therein mentioned, and in obedience to the said decree, *Christopher Walter* and *Eleanor*, his wife, the widow of the testator, *William Barry*, his eldest son, and *Alice*, his wife, and *Martin*, *Walter*, and *John*, *Barry*, three of the younger children, granted, released, and confirmed, to *Shurmer* the settled premises, to hold to the use of him, his heirs, and assigns; and in *Hilary* term 1741, a fine was levied, in

which all the above parties joined. Afterwards *William Barry* died during the life of *Eleanor Walter*, his mother. 1806.

The principal objection, taken by the Defendant to the title, was, that it was necessary to furnish the Defendant with evidence, that there was a total failure of issue of *William Barry*; as there was strong ground to contend, that the limitation in the settlement to the heirs of the body of *Eleanor Barry* operated as a contingent remainder in favour of the persons answering that description at the time of her decease; and, as *William Barry* died in her life, and never answered that description, there was reason to suppose, the estate might be still subject to the title of a descendant of *William Barry*; further, that the parties had not acted under the decree of the Court of Chancery, which could therefore be of no use; and which was defective and irregular: first, in not directing an account of the personal estate; which ought to have been applied in the first instance, in case of the real estate: 2dly, in directing the execution of the contract without an inquiry, whether it would be for the benefit of the parties interested; 3dly, in directing the surplus of the purchase money, after satisfaction of all the debts and incumbrances, the Annuity to the widow, and the charge of 500*l.* for the younger children; to be paid to the eldest son. [93]

Coates v. Price.

In answer to the first objection it was urged on the part of the Plaintiff, that *Eleanor Barry* under the limitations of the settlement of 1795, on the death of her husband *Martin Barry* took an estate tail; that it was not affected by her subsequent marriage with *Walter*, and therefore the fine levied by *Mr.* and *Mrs. Walter* on *Shurmer's* purchase barred such estate tail; and enabled them, even without the concurrence of any of her sons to make a good title; and the evidence required was therefore unnecessary; that the decree, though the account was not taken, which was waived by the eldest son, would protect the purchaser; who paid the incumbrances and specialty debts; and parties, claiming under the settlement as volunteers against the effect of that decree and what was done under it; could not disturb a purchaser for valuable consideration; who has against the settlement all the equity of the mortgages, incumbrances, and debts, paid; that after 64 years since the purchase from the family of *Barry* under that decree, and nearly 30 years since the death of *Eleanor Barry*, there was little to be apprehended from the possibility of a claim.

Mr. Piggot, *Mr. Romilly*, *and Mr. Leach*, *for the Plaintiff*.—This deed giving an estate of freehold to *Eleanor Barry*, with a subsequent limitation to the heirs of her body by *Martin Barry*, lawfully begotten, or to be begotten, contained in the same instrument, she took a vested estate tail; and there is no ground for contending, that her heir will [94]

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take a contingent remainder, as a purchaser. The rule in *Shelly*'s case (*a*) has been always applied to a deed, as much as to a will. But it will be contended, that the last limitation, to the heirs of the body of *Eleanor Barry* by *Martin Barry*, begotten or to be begotten, is an equitable estate, and cannot unite with the preceding legal estate; the only way therefore, by which the latter can have effect, is as a contingent remainder; which cannot take effect during the life of *Eleanor Barry*, according to the maxim, "*Nemo est hæres viventis*." The estates for life to *Martin* and *Eleanor Barry* are clearly legal estates; and if the subsequent remainder is vested, it could not by any subsequent event become contingent; though a contingent remainder may by a subsequent event become vested. The heir having joined in barring the estate tail, no objection can be raised upon the statute of *Henry* VII., (*b*) as to estate taken *ex provisione viri*: which would certainly have prevented a fine by her alone; extending to fines as well as recoveries, according to *Shepherd's Touchstone*, and *Piggot* upon recoveries: which is also plain from the statute of *Hen.* VIII (*c*)

The principles of the case of *Doe* v. *Hicks*, (*d*) a case upon a will, have a direct application. The construction is not rational, and the intention could not be, that the trustees should take the absolute fee in the first instance; a term of 100 years by express limitation immediately afterwards. The former estate therefore must be limited to the life of *Eleanor Barry* with which life the objects of that trust terminate. *Venables* v. *Morris* (*e*), which was upon a [95] deed, is distinguishable. This case is much stronger than *Lloyd* v. *Johnes* (*a*) in which the irregularities were much more extraordinary. In this instance every one of the family was brought before the Court.

Mr. Richards and Mr. Bell, for the Defendant.—Admitting, that the son having joined, no objection can arise upon the statute of *Henry* VII. the first question is, whether, upon the face of this deed, *Eleanor Barry* had such an estate as enabled her to make a title in the manner, in which she has attempted to do so. The intention must govern in the construction of a deed, as well as a will: the only distinction being, that it is sought with more liberality in the latter instrument than in the former, supposed to be prepared with better advice. If *Eleanor Barry* should marry again, the object was to deprive her of the estate, before limited to her, and to give her only a rent-charge. From the period of a second marriage there is no estate in her, but only an interest to receive the annual sum of 50*l.*; and the whole interest in the estate is in the trustees; who are

(*a*) 1 *Rep.* 94. (*b*) Stat. 11 *Hen.* 7. c. 20. (*c*) Stat. 32 *Hen.* 8. c. 36.
(*d*) 7 *Term Rep.* 433. (*e*) 7 *Term Rep.* 342. 438
(*a*) p. 95. *Ante*, vol. IX. 37.

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in law and equity the owners, subject to their trust. There was no estate therefore, with which, when she became a widow, the limitation to the heirs of her body could unite. That limitation might avail as a contingent remainder to the heir of her body at her death. When she levied the fine, therefore, she had no interest: neither had her son; for until her death her heir could not be known. The effect of the words *prima facie* is to give the absolute estate to the trustees; and it must be shown, that it was only for the life of the widow; which cannot be implied, unless required by the general tenor of the deed. But upon this deed an absolute necessity appears, that there should be this estate in fee-simple. If one part of the estate must necessarily have been in the trustees in fee, as the advowson must, the same construction should be made as to the whole. The advowson is not confined to the life of the widow. The second or any other son is to be instituted and inducted even after her death, at any distance of time; which shows, the object was a continuing trust. The construction of this deed therefore is necessarily, putting it in the strongest way, a legal estate to the wife, for life, with an equitable, and therefore a contingent remainder to the heir of her body. It is not probable, that the eldest son was intended to be wholly in her power. [96]

Next, the decree is erroneous. There was no right to waive the account. It is irregular also in other respects; stating that the conveyance was void, as being voluntary. Such a deed is void as against purchasers; but not as against creditors, unless it is fraudulent, for which purpose there must be creditors at the time, according to *Stephens* v. *Olive*. *(a)* If the limitation to the heirs of the body is a contingent remainder, then it rests upon the decree; and the payment to the son was quite wrong. The title, if bad in itself, is not confirmed; as being made under the direction of a Court of Equity.

Mr. Piggot, in Reply.—The objection, that the intention could not be to give the wife a power of disappointing the eldest son, might be made in every case, in which the rule in *Shelly's* case prevails. In truth the author of the instrument has no such intention: the power arising from the construction of the law upon the words. But that intention cannot be attributed in this instance consistently with the rules of law, as the trust must necessarily determine with the death of *Eleanor Barry*, and cannot endure beyond that period. It is not uncertain in any other respect than as depending upon the duration of her life. The term cannot be rejected, and cannot stand with the fee in the same trustees. [97]

(a) 2 *Bro. C. C.* 90. *Williams* v. *Kidney*, *post*, [p. 136.] *Lush* v. *Wilkinson*, *ante*, vol. v. 384.

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The MASTER *of the* ROLLS.—In this cause I understand that both parties wish to have my judgment, without a reference to the Master, or stating a case; which I should, upon one point, have been disposed to direct. It is admitted, that, if *Shurmer* acquired a good title in 1740, the Plaintiff can make a good title now; and it is admitted, that *Shurmer* did acquire a good title, provided there was an estate tail in *Eleanor Barry*, afterwards *Walter*; for it is not contended, that the Statute of *Henry 7. (a)* has any operation. That Statute, being made for the protection of the interests of the issue, cannot apply, when the heir in tail himself has joined with his mother either in the fine, or in the conveyance, declaring the uses it is intended to effectuate. But, supposing her not to have had an estate tail, and consequently that *Shurmer* did not, by the mere force of the conveyance to him, acquire a title, yet it is contended for the Plaintiff, that he had a secure and unimpeachable title by the decree, under which he purchased. The first consideration therefore is, whether *Mrs. Barry*, afterwards *Walter*, had an estate tail; depending upon the question, whether upon the construction of the settlement of 1725 the remainder, limited to the heirs of her body, be
[98] legal or equitable: if legal, it is said, it will unite with the freehold interest, given to her before; and will vest in her an estate tail; if equitable, it cannot so unite with the preceding legal freehold; and the consequence is, that it must be a contingent remainder to such person as should answer the description of heir of the body of *Eleanor Barry* at the time of her death. The use to *Martin Barry* was executed in him; not a trust: so was the use to his wife during her widowhood a use executed. Then, upon the event of her marriage, follows the limitation, upon which the question arises; giving the trustees the absolute fee; and the use is executed in them.

It is contended for the Plaintiff, that, though this limitation does in words give the absolute fee to the trustees, yet in sound construction, both with reference to the purposes, for which it is limited to them, and to other parts of the settlement, it must be construed, as if the words "during her life" were added to the limitation to the trustees. It is said, the purposes, for which the limitation is raised, are purposes, that terminate with her life: the first trust being to pay her 50*l.* a-year during her life: the other trust to employ the residue of the rents and profits in the maintenance of the children. I keep out of view for the present the clause as to the advowson; and, passing that by, shall consider afterwards, whether that will make a difference in

(*a*) Stat. 11 *Hen. 7. c.* 20.

the construction. It is said, the settler must have intended to limit the estate of the trustees to the life of the wife; for at the moment of her death the term is given to those very trustees; which, upon the supposition, that they had the fee already by the use executed, could not arise: it is therefore necessary to adopt a construction, that will give effect to the whole settlement; and, if the proposed construction be adopted, then the remainder to the heirs of the body of *Eleanor Barry* will be, not contingent, but vested; and will unite with the estate for life. I am taking that for granted, that it will unite, though it was in some degree argued, but not pressed, that as her estate is to terminate in case of her second marriage, the two estates could not unite, so as to vest a complete estate tail. That point is quite at rest; for all that is required by the rule in *Shelly's* case, *(a)* is, that the ancestor shall take an estate of freehold, and afterwards in the same conveyance an estate shall be given to his heirs. The estate during widowhood is an estate of freehold; and the possibility, that it may terminate in the life of the widow, and before there can be an heir, is no objection.

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Against this construction it is alleged, that it is necessary, that the fee should remain in the trustees beyond the life of *Mrs Barry*, on account of the clause, which immediately succeeds the declaration of the trust, upon which the trustees were to hold the estate, before limited to them. It is clear, that, if the estate of the trustees can upon other grounds be confined, as the Plaintiff contends, it is not necessary, that it should remain unlimited by any thing contained in that clause; for it is no declaration of any trust which the trustees have to perform. It is, not a declaration, that they shall present to the living; or do any act; but a declaration of the intention of all the parties, that, if there shall be a second, or any other younger, son, capable of taking the next presentation, he shall have it; as he might; let the presentation be vested in whom it may. The only question then is, whether the Court is authorized, upon the other ground, to read this settlement, as if the words "during the life of *Eleanor Barry*" were inserted. The case of *Doe* v. *Hicks (a)* is very much in point; where, though the limitation to the trustees was not expressed to be confined, yet it was construed to operate only for the lives of the several tenants for life; upon two grounds: first, that the object, for which the estate was given to the trustees, did not require it to endure any longer; the object being to preserve contingent remainders: 2dly, that the intention must have been to limit, at least the party must have understood himself to be limiting, only during the

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(a) 1 *Rep.* 94. (a) p 100. 7 *Term Rep.* 433.

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lives of the several tenants for life; as he repeated the limitation each time that he limited estates for life.

That, I admit, was the case of a will. A case however, a short time before, upon a deed is there cited; which gave Lord *Kenyon* occasion to state the ground, upon which the former case was decided, more particularly than upon the argument of that case. The other case is *Venables* v. *Morris; (b)* in which the Court held, that they could not read the deed, as if the words "during the life of *Hannah Mor-* "*ris*" were inserted. But Lord *Kenyon* stated the ground of the difference to be, not, that the one case was upon a will, the other upon a deed: but, that in the one case the construction was necessary; to give effect to the apparent intention: in the other it was not necessary; and in my opinion not only was not necessary, but was not consistent with that, which the settlement meant to provide for: that is, not with all the cases it meant to provide for. An estate for life was limited to the husband, with remainder to trustees to preserve contingent remainders: remainder to
[101] the wife for life; and a limitation to the trustees, and their heirs, generally, not during the life of the wife, to preserve contingent remainders; but a power of appointment was given to the wife. In the execution of that power she might have occasion to make contingent limitations; and therefore the estate was very properly left absolute in the trustees, to support those possible contingent limitations.

In this case there is, first, what existed in *Doe* v. *Hicks: (a)* a purpose to be answered, for which an estate in the trustees during the wife's life would be sufficient; laying the advowson out of the case: next, a limitation for a term of years: which could not arise consistently with the estate in fee to the same trustees. Therefore not only is this case similar to that of *Doe* v. *Hicks* in the particular upon which the Court proceeded, but this is stronger; as the intention, not only would not be answered, but would be contradicted, unless the Plaintiff's construction is put upon the general words of the limitation to the trustees. As this however would have been a very fit question to be submitted to a Court of Law, *viz.* what interest the trustees took during the life of the wife, I should feel considerable reluctance in deciding it by my opinion; if the judgment I have formed upon the other branch of the case did not render it of very little consequence, whether that opinion is well founded, or not.

The second question is, whether the purchaser *Shurmer* in 1740 was not perfectly secure by the decree, under which he purchased: whatever might be the direct effect and operation of the conveyance made to him under that decree,

(b) 7 Term Rep. 342. 438. (a) 7 Term Rep. 433.

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as considered separately. *The settlement was executed after the settler's marriage: a voluntary settlement. A creditor filed his bill in 1740; impeaching that settlement, as voluntary, and consequently fraudulent against creditors by specialty; stating likewise a contract by the several parties, the mother and sons and *Shurmer*, for the purchase; that *Shurmer* declined to perform the contract without a decree; and praying execution of the contract. The bill stated, that the personal estate of *Martin Barry* was very inconsiderable; which was also stated by the answer. Upon this case a decree was made; declaring the settlement voluntary, and void against specialty creditors; directing an execution of the contract; and that, upon payment of the money, all necessary parties should join in the conveyance of the estate to the purchaser. It is said, that, though *Shurmer's* purchase was thus sanctioned by the decree, yet there are many irregularities in that decree; and therefore his title does not derive from it that protection, which it would have from a decree regular in all respects. The ground, upon which the decree proceeds, is, that the settlement is voluntary: so that the point now to be examined is, whether there was sufficient ground for so declaring it. The bonds were executed before the settlement. Upon the face of the proceeding therefore the party was indebted at the date of the settlement; and upon the answer he must be taken to have been indebted to a very considerable amount at the date of the settlement; and his death happened soon afterwards. It is impossible at this time to raise a doubt, whether the decree had any foundation, or not. It must have been proved, that this settlement was under circumstances, that made it voluntary according to the Statute, *(a)* and the construction, given to the Statute by this Court. This is not a case therefore, [103] in which there is any question upon the title of the estate to be sold; for no doubt is started, that this was the estate of *Martin Barry*. It was right therefore to sell it for his creditors. This is not a case, where there is a doubt, whether the person had any title to the estate; and consequently, whether the purchaser could acquire any title.

[* 102]

Then, if this case is to be considered, as if it was clear, that the remainder to the heirs of the body of *Eleanor Barry* was contingent, the question is, whether that makes any difference with regard to the security of the title which the purchaser gets under the decree. It would make great difference with regard to the conveyance from the party. A settlement of this kind is void only as against creditors: but only to the extent, in which it may be necessary to deal with the estate for their satisfaction; it

Voluntary settlement, void against creditors, good to other purposes.

(a) Stat. 13 *Eliz. c.* 5.

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is as if it had never been made. To every other purpose it is good. Satisfy the creditors; and the settlement stands. The Court frequently is obliged to sell the whole estate; though the whole proceeds are not necessarily applicable. But the purchaser is not answerable for the mode in which it has been sold by the Court, nor for the disposition which the Court makes of the money. The objections, taken to this decree, are, that the Court has not done what it ought for the security of those, who, after the creditors, had an interest in the estate upon the Defendant's construction. What is that to the purchaser? Is it for him to inquire, whether the Court has dealt properly with the fund which it obliged him to pay in?

It is said, there are two omissions and an improper direction in this decree, upon the supposition, that the ultimate interest in this estate is in contingency. [104] The first omission is, that there is no account of the personal estate; which ought to have been applied in the first instance in ease of the real estate. But that is a direct act of the Court; not, that the account is waived by the agreement of the parties: but it is waived in the presence of the Court by the express assent of the eldest son. Another act of the Court was the direction for execution of the contract without any inquiry, whether it would be for the benefit of the parties interested That is a precaution, that, if it was in the view of the Court, and for unascertained parties, who might be interested, it might be fit to adopt. But that also is the act of the Court. Is it to be expected, that the purchaser should insist upon that inquiry?

The improper direction, as it undoubtedly would be if the deed is to be construed as the Defendant contends, is, that the surplus of the money after payment of all the debts and incumbrances, the sum, which the widow agreed to take for her Annuity, and the 500*l.* to the younger children, should be paid to the eldest son. If it was not yet ascertained, who the heir of the body would be, as it could not be, if the limitation was a contingent remainder, that was an improper direction. The money ought to have been brought into Court. But that is not an application of the money, for which the purchaser can be accountable. The only way, in which the party is really interested, if he should turn out to be a different person from any of those parties to that proceeding, to affect the purchase, is, that no account of the personal estate was directed; for upon any other supposition than that the personal estate was fully sufficient, the real estate must have been sold. But that is so improbable a supposition after such a length of time, 65 years, that it cannot be looked at as a point the party should [105] be let in to establish; *viz.* that the personal estate was sufficient for all the debts; and I do not know, that it would

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Sale of real estate decreed provisionally, without waiting the account of the personal estate, previously applicable.

do him good; for frequently upon the Master's report the Court decrees a sale provisionally. (a) Probably the parties were satisfied, that the personal estate was very inconsiderable, and the account would have answered no purpose; and would have created expense. *William Barry* could have no interest in waiving it; for he was to get the balance. Therefore his interest required the previous application of the personal estate.

Then the only injury could be by not procuring a sufficient price, and not securing the money for the person entitled. In *Lloyd* v. *Johnes* (b) irregularities the most substantial had taken place. In that case an account of the personal estate had been actually decreed: yet it was never taken. So, it might be argued, that the decree had made it a condition precedent to the application of the real estate, that the personal estate should be first applied. Then the cause was brought on for further directions upon a separate report; and one, that was never filed. The decree upon further directions for a sale was to pay, not only the testator's debts, but also those of *Pugh;* which were no charges upon the estate. Yet the Lord *Chancellor's* opinion was, that, if the purchaser could not be affected upon some other ground, he could not be affected by the irregularity of the proceedings; though he had notice: all the proceedings being stated in the agreement for his purchase; and, though the Lord *Chancellor* was willing to direct the the account, if desired, I do not understand, that his lordship intended that to affect the purchaser; but only to show the claims of the parties, interested in the result of that account as against each other.

Supposing therefore this decree liable to objection in all these points, the purchaser is not in any degree responsible: and is perfectly safe in the title; which he takes under the decree. I have reasoned this upon the supposition, that the decree is irregular. But for that I must suppose, that the Court construed the settlement, as the Defendant contends it ought, and as I think it ought not, to be construed; for, as I construe this settlement, the decree is not liable to objection throughout; for upon that supposition the parties had among them the whole interest in the estate. *William Barry*, having agreed to purchase his mother's interest, might properly waive the account of the personal estate, and any reference as to the contract; and it is scarcely possible, that the Court could proceed upon any other ground; the settlement being distinctly before the Court at length upon the pleadings. I have stated, that, when a settlement is declared void as to creditors, it is only as to them. The Court was therefore necessarily called

[106]

(a) See *Lloyd* v. *Johnes*, *ante*, vol. ix. 65. *Holme* v. *Stanley*, *ante*, vol. viii. 2. (b) *Ante*, vol. ix. 37.

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upon to look into the settlement; in order to see what to do with the residue of the purchase-money; and, directing that to be paid to *William Barry*, they could not possibly construe the limitation to be a contingent remainder: which would have left the right to the money perfectly unascertained. The Court must therefore have proceeded upon the same ground, that is, I think, now to be adopted.

Upon both grounds, therefore, this agreement ought to be performed.

[107]

1804. *March* 17. 19, 20. 1805. *Aug.* 27.

GASKARTH *v.* Lord LOWTHER. (*a*)

Decree upon the answer, admitting a contract, and a letter, offering to sell at a valuation, for a conveyance on payment of the purchase money into the Bank by the Plaintiff on a certain day; in default of payment the bill to be dismissed with costs.

No binding contract until payment.

The estate therefore did not pass by a previous devise; but descended to the heir.

THE late Lord *Lonsdale* in *August* 1790 purchased by auction the Manor of *Penrith* and other estates in *Cumberland*, belonging to the Plaintiff. Some correspondence took place between the Solicitors, with reference to the abstract: but, though the purchase was to be completed by the 2d of *February* 1791, no effectual step was taken for carrying the contract into execution previous to the year 1796. On the 1st of *January* in that year a letter was written to Lord *Lonsdale* by the Plaintiff; which, reminding Lord *Lonsdale*, that, when the Plaintiff sold his estate at *Penrith*, some years ago, his Lordship was one of the purchasers, proceeded thus:

"I am under the necessity of settling all my affairs; and "therefore most earnestly desire you to say, when I must "wait upon you to complete your purchase? and I hope, "an early day will not be inconvenient. I have since your "agreeing to purchase, bought a small estate of the late "*Mr. Raincock's* in front of my house, which was always "thought a very desirable thing. I offer that at a fair "valuation. I suppose you'll think with me that they should "not be again separated. If it is not your wish to com- "plete the purchase of what you bid for, please to inform "me; and order any writings or articles of sale to be re- "turned." The letter concluded with expressing his anxiety "to finish this purchase," and the difficulties "this "purchase uncompleted" might cause to his heir and Lord *Lonsdale*: and pressing for an answer.

[108] Upon the 30th of *April* 1796 Lord *Lonsdale* filed a bill against *Gaskarth*; stating the sale by auction; attributing the delay in completing the purchase to defects in the title: alleging, that on the 3d of *January* 1796 an agreement in

(*a*) This case, decided by Lord *Eldon*, and one or two more, that will appear in this volume, could not from particular circumstances be published sooner.

writing was signed by *Gaskarth* for the purchase by Lord *Lonsdale* of the other premises in *Penrith*, mentioned in the letter, at a fair valuation; and praying a specific performance of both contracts.

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The defendant *Gaskarth* by his answer to that bill stated, that the Defendant not receiving any answer to his repeated desire, that the Plaintiff would complete his purchase, served notices; declaring the deposits forfeited, and the contracts void: and after some further negociation about the title gave another notice, offering a conveyance on or before the 3d of *June* 1791 of the manor and estate at *Penrith*; requiring payment of the money, with $4\frac{1}{2}$ *per cent.* interest from the 2d of *February*; and declaring, that the Defendant would not consider himself bound to execute such conveyance at any future time after the 3d of *June*; that he had not entered into any agreement with Lord *Lonsdale* except as to the estates sold by auction; but admitted the letter above stated; and that Lord *Lonsdale* in consequence of such letter expressed his inclination to purchase the premises mentioned in it. *Gaskarth* also by his answer offered, not only to complete the purchase at the auction, (suggesting however his right to consider it as abandoned,) but also to sell the other estates, mentioned in the letter.

In *March* 1800 a decree was made in that cause; directing, that Lord *Lonsdale* should pay 5420*l.* 14*s.* the remainder of his purchase for the estates sold by auction, into the Bank, with interest at the rate of 5*l. per cent.* from the 2d of *February* 1791 to the first day of next term; and that [109] *Gaskarth* should convey; and it was ordered, that on payment into the Bank of the said 5420*l.* 14*s.* Lord *Lonsdale* should be let into possession of said estates; and the Master was directed to set a value on the estates of *Gaskarth*, in the decree described as the estates purchased of *Mr. Raincock*; and all necessary parties were to execute conveyances upon Lord *Lonsdale's* paying to *Gaskarth* what the Master should find to be the value of the said estates; and that upon such payment Lord *Lonsdale* should be let into possession from the quarter-day preceding: but in default of Lord *Lonsdale's* paying the said 5420*l.* 14*s.* by the first day of the next term, then his bill should stand dismissed with costs. In pursuance of that decree Lord *Lonsdale* paid into the Bank 5420*l.* 14*s.*; and the estate purchased of *Raincock* was valued at 1700*l.*: but before the report Lord *Lonsdale* died; having by his will, dated the 13th of *January* 1798, executed to pass real estates, devised all his manors and hereditaments in *Westmoreland* and *Cumberland*, with some exceptions, to the use of Lord *Lowther* and his first and other sons, in strict settlement; with various remainders over.

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In *January* 1803 *Gaskarth* filed a bill of revivor and supplement against the heirs at law and by the custom and the devisees of Lord *Lonsdale;* praying, that the suit may be revived; and that the Plaintiff may have the benefit of the decree.

The Defendants, the heirs at law of Lord *Lonsdale*, by their answer stated, that by the answer and proceedings in the original cause it appears, that the Plaintiff did by letter, dated the 1st of *January* 1796, propose to sell to Lord *Lonsdale* the estate, purchased of *Raincock;* but submitted, that the precise time, when Lord *Lonsdale* agreed to pur-
[110] chase the said estate, and when he acquired an equitable estate of inheritance therein does not appear; and, if such equitable estate or interest was not acquired by him until after the date of his will, the Defendants are entitled as heirs at law. The customary heir claimed any customary or copyhold estates, not surrendered to the use of the will; or, that did not pass thereby.

By another decree, pronounced at the Rolls on the 4th of *May* 1803, the former decree was ordered to be prosecuted; the accounts were directed; and the Master was ordered to state the precise time, when Lord *Lonsdale* agreed to purchase the estate, described as purchased from *Raincock* and, when Lord *Lonsdale* acquired an equitable estate of inheritance thereon.

The Master by his report stated, that under the decree in the original suit it was optional in Lord *Lonsdale* either to complete his purchase by paying his purchase-money, pursuant to the decree, or to abandon the same; which, as far as respected the original suit, he could have done by refusing to pay the said 5420*l.* 14*s.* into the Bank; in which case the bill would have been dismissed with costs; and the 30th of *April* 1800, being the day, on which Lord *Lonsdale* did pay the 5420*l.* 14*s.* into the Bank, was the time when he agreed to purchase, and acquired an equitable estate of inheritance in the estates, purchased from *Raincock.*

To this report an exception was taken by the devisees; suggesting, that the precise time, when Lord *Lonsdale* agreed to purchase the estates, described as purchased from *Raincock*, and, when he acquired an equitable estate of inheritance therein, was the 30th of *April* 1796, the day, on which Lord *Lonsdale* filed his bill; or the 1st of *January* 1796, the date of *Gaskarth's* letter.

[111] *The Solicitor-General,(a) Mr. Romilly, and Mr. Thomson, in support of the Exception.*—The instant Lord *Lonsdale* filed his bill, there was a binding contract: *Coleman* v. *Upcot,(b) Potter* v. *Potter.(c)* But there can be no doubt upon the answer, put in by *Gaskarth* to that bill; by which answer he sub-

(a) The Hon. *Spencer Perceval.* (b) 5 *Vin.* 527. (c) 1 *Ves.* 437.

wits to perform the contract. It is clearly established by *Greenhill* v. *Greenhill*, (*d*) and *Langford* v. *Pitt*, (*e*) that lands, contracted for previously to the execution of a will, may pass by that will. 1806. GASKARTH v. LORD LOWTHER.

Mr. Mansfield, *Mr. Alexander*, *Mr. Richards*, *and Mr. Martin*, *for the Heirs at law*.—There was no binding contract, making this estate in Equity the estate of Lord *Lonsdale*, previous to the date of the will. The conclusion is, that after the notice given by this Plaintiff, that, unless the money should be paid by the 3d of *June*, the contract would not be performed, it was abandoned by Lord *Lonsdale*, who must have been discharged by that notice. Then can the mere circumstance of filing the bill be considered as binding the contract on the part of Lord *Lonsdale*, so as to give the devisees the right to his estate, for nothing else was done by Lord *Lonsdale*? How can the bill constitute an agreement? The statement in the bill is considered as the suggestion of Counsel, and cannot be read in evidence, except perhaps upon a question of pedigree. Would this decree have imposed the unusual condition of interest at 5*l* per cent if the contract was considered as bound by the bill? [112] *Cotton* v. *Lloyd* (*a*) does not decide, that a bill filed merely is such an assent to a written contract as will bind the Plaintiff. There was no acceptance, binding Lord *Lonsdale*, at the paid in his money. The argument must be carried to its length, that, if Lord *Lonsdale* had thought proper to dismiss the bill, still he might be called upon, as bound by it to perform the contract. Upon what principle can the bill be considered as agreement? Does the party, or his authorized agent, sign the bill? The decree even expressly gives an option. After the letter in 1791, to which no answer is given, Lord *Lonsdale* could not possibly have insisted upon a performance of the contract, at least not before 1796, and therefore was not bound. The letter of 1796 could neither revive the old contract, nor create a new one. It is the letter of a suitor, requesting relief, and offering a boon, not a demand of the completion of a subsisting contract; but a request to do something, which the writer did not consider him bound to do, notwithstanding the expression "to complete the purchase" occurs in it. The answer, stating, that in consequence of that letter Lord *Lonsdale* expressed his inclination to purchase the premises, does not bring it further than treaty. There was *locus pœnitentiæ*; and Lord *Lonsdale* might have refused to pay in his money, and have had his bill dismissed. In *Whaley* v. *Bagenal* (*b*) much more passed than in this case; yet the party was held not bound. To constitute an agreement the writing must specify the terms; which this letter does not, merely offer-

(*a*) 2 *Vern.* 329. (*b*) 1 *Ves.* 528.
(*c*) 2 *P. Will.* 629. (*d*) 6 *Bro. P. C.* 45.

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ing the estate at a fair valuation; and never carried beyond treaty.

The Solicitor-General, (c) *in Reply*.—At the date of the will there was a subsisting contract, binding both parties. The treaty, if interrupted between *June* 1791, and *January* 1796, was revived by the answer. The letter clearly recognizes the contract; and makes an offer of the lately purchased estate; and the answer offers to complete the purchase, and to sell the other land. Upon the offer in the bill the Defendant might by a cross bill have compelled the Plaintiff to perform the contract. The bill and the answer together form a contract, binding both parties. The principle is stated by Lord *Hardwicke* in *The Attorney-General* v. *Day*: (a) that, if the vendor puts in an answer, admitting the agreement, as stated by the bill of the purchaser, though not in writing, nor so stated by the bill, the Court will decree a performance; and so against the heir: the principle going throughout; and equally binding the representatives. It is not admitted, that the dismission of the bill would have relieved Lord *Lonsdale* from the contract, if the other party chose to insist upon it. The answer to the objection, that the offer of *Raincock's* estate at a fair valuation is too loose, and goes no further than treaty, is, that it is not unfrequent to have the price ascertained by a third person, (b) or, if that person cannot ascertain it, by a reference to the Master: all the other terms, except the price alone, being agreed upon. This decree cannot be represented as giving an option to Lord *Lonsdale*.

[* 113]

Aug. 27.

The Lord CHANCELLOR. (c)—In this state of things it is impossible to say, either party was bound. The letter of the Plaintiff cannot be considered a contract in the judgment of the Court (1) The bill cannot be considered a contract. The case in *Viner* was under very different circumstances. It is clear from this decree, the Court did not consider the filing of the bill as a contract. The reference to the Master also shows that; for otherwise it would be confined to periods antecedent to the bill. Then did the decree bind Lord *Lonsdale*, and make the estate his; or the payment of the money into the Bank? My opinion is, that he was not actually bound; and therefore the estate was not his, until the money was paid into the Bank, and therefore the judgment of the Master is right.

[114]

(c) The Hon. *Spencer Perceval*.
(b) *Emery* v. *Wase*, *ante*, vol. v. 846.
(c) p. 113. Lord *Eldon*.
(a) 1 *Ves.* 218. See p. 221. Vol. VIII. 505.

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(1) An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made. *Ellason* v. *Henshaw*, 4 Wheaton, 225. See *Tucker* v. *Woods*, 12 Johns. Rep. 190.

The exception was over-ruled; and it was declared, that the co-heirs at law of the testator, the late Lord *Lonsdale*, are entitled to have a conveyance of the freehold premises, purchased in 1790, and also of the estate, purchased in 1796 from *Rainock*; and a conveyance was directed accordingly.

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CHILCOT *v.* BROMLEY.

ROLLS. *February* 4.

ROBERT BROMLEY by his will, dated the 29th of *March* 1802, made the following bequests:

"I give unto my servant *William Wilde*, in case he shall "be in my service at the time of my decease, the sum of "500*l.* and the sum of 20*l.* for mourning, and also all my "wearing apparel of every sort and kind; and I give and "bequeath unto my servant *Sarah Nelson*, in case she shall "be in my service at the time of my decease, the sum of "500*l.* and the sum of 20*l.* for mourning; and I give and "bequeath unto all * my other servants who shall be living "with me at the time of my decease the sum of 50*l.* each "and the sum of 10*l.* each for mourning;" directing all the said legacies to be paid within three months after his decease.

Under a general bequest to servants, a coachman, provided with the carriage and horses by a job-master, according to the usual course of that business, not entitled. (1) [* 115]

By a codicil, dated the 28th of *February* 1803, noticing the bequests by the will, the testator revoked the legacies of 50*l.* and 10*l.* for mourning to his other servants, not particularly named; and made the following bequest:

"To all my other servants in lieu thereof the sum of 500*l.* "each, and 20*l.* each for mourning."

The testator died soon after the execution of the codicil. The bill was filed against the executor; the Plaintiff claiming the legacies of 500*l.* and 20*l.*, as one of the servants of the testator at the time of his death, under the following circumstances. The testator hired a carriage and horses by the year from a job-master; who also supplied a coachman. The coachman did not board or lodge in the testator's house; but received from the testator 12*s.* a week, as board-wages, and a livery with the other male servants: the job-master also paying him 9*s* a week. The Plaintiff lived with the testator in that capacity, and upon these terms, about ten months previous to his death, having been procured for that purpose by the job-master; and was returned by the testator as his coachman under the act imposing a duty on male servants; and during that period he served no other person.

(1) See *Ex parte Mellish et al.* 3 Bligh. 167 *Boniface v Scott*, 3 Swanst. 490 n.

1806.

CHESOR v. BROMLEY

The evidence as to the usage of job-masters was very contradictory; for the Plaintiff representing, that the coachman supplied under such circumstances, is in all respects the servant of the family employing the horses; except that the job-master usually, in consideration of the care of the
[* 116] carriage and horses, pays him a further salary by the week or year; and the family, to whom he is so hired, has the whole controul over him, to retain, change, or discharge him, as any other servant, without the concurrence of the job-master, who has no such power; the evidence on the other side being directly the reverse: that according to the usage of the trade the coachman is the servant of the job-master; paid by him, except a weekly allowance for board wages; and subject to be dismissed, or otherwise employed by him, without the consent of his customer.

Mr. Richards, and Mr Hall, for the Plaintiff, cited *Townshend* v *Windham*, (*a*) and *Leake* v. *Brandsby*, (*b*) insisting, that the testator, not the job-man, must be considered as the master of this servant, and would as such have been liable in an action of trespass for any injury to a third person, occurring in the employment of driving that carriage. They also observed, that a gardener, employed even by the day, must under the Act of Parliament (*c*) be returned as a male servant

Mr Romilly, and Mr Heald, for the Defendants, insisted, that this Plaintiff could not maintain a claim to these legacies: that the action of trespass must be brought against the job-man, who alone could be considered as the master; and who might have changed the coachman at any time, a week even before the death of the testator

[117] *The* MASTER *of the* ROLLS—The question is, whether the Plaintiff was a servant of the testator within the intent of this will My opinion is, that there was no contract between them out of which the relation of master and servant could grow. The contract was between the testator and the job-master. The latter engages to furnish the former with horses, and a man to drive them. The job-master has persons, whose duty it is to perform that service. The particular person serves the job-master by driving my carriage: and is so far in my service, but in consequence of a retainer by the other, and a contract with him That contract would be fully satisfied, if he changed the coachman every week. Can the testator be supposed to include a person, whom he had not selected, and chosen to bring into his service for any definite period, and with reference to the continuance of his service utterly uncertain; for, as has

(*a*) 2 Vern. 546. (*b*) 2 Rep. Ch. 52. (*c*) Stat. 38 Geo. 3.

been observed, the very week before the testator's death, a different man, for whom the testator had no predilection, might have been furnished by the coach-master. The testator could not complain, that the man was changed, as of a breach of the contract; if the testator had no reason to complain of the person substituted, as to his sobriety and conduct. The mere change of the person would furnish no ground of complaint against the job-master. If he can change the men subject only to the chance of disobliging his employer, no obligation to prevent it arising out of the contract, he is the master; though a part of that man's duty to him is to serve the other.

1806.

CALLCOT v. BROMLEY.

It is not probable, that a testator in such a situation as this testator, with the experience he had of the manner in which these servants were changed, could have intended to put this person upon a footing with servants, brought into his house by a contract of his own, from preference, arising out of previous inquiry into their characters, and satisfaction with their services. From his own experience he knew, a stranger might be introduced without any previous consent, or any thing but merely bringing him, in order to show, that he was not a person disagreeable to the testator. From the instant the testator expressed no disapprobation, the contract goes on, not with him, but with the job-master; and it is stated, I believe, by some witnesses, that the amount of the board wages is contracted for between the job-master and the employer. All the terms of the contract are between them. The coachman is merely the subject of the contract: not a party to it. This Plaintiff therefore is not a servant within the intendment of this will.

[118]

The Act of Parliament, (a) that has been mentioned, cannot affect the question. That is merely a revenue law; and, to prevent evasion, it provides, that any sort of service shall subject the employer to return as a servant the person employed. The effect is merely, that certain acts shall make a man liable to the tax. It does not by any means determine, whether he is a servant for such a purpose.

The bill was dismissed without costs.

(a) Stat. 38 Geo. 3.

1806.

ROLLS.
Feb. 13.

HASSALL *v* SMITHERS.

A remittance in bills and notes, for a specific purpose, *viz.* to answer acceptances, received by the Administrator, in consequence of the death of the party to whom it was remitted, held not general assets the special purpose operating a lien which would also be the effect upon a Bankruptcy. (1)

THE Master's report in this cause stated, that the Defendants, as administrators of *Richard Papps*, on the 1st of *December* 1800, received the sum of 218*l.* 15*s.* under the following circumstances.

Abraham Illingworth, of *Montgomery*, was in the habit of drawing bills on the intestate *Papps*; who at his death had accepted bills for *Illingworth* to the amount of 5333*l.*; and had received from *Illingworth* towards answering those bills 2300*l.* On *Saturday*, the day before the death of the intestate, *Illingworth* remitted to him bank notes and bills, to the amount of 218*l.* 15*s.* for the purpose of providing, as far as the same would extend, for his acceptances, when they should become due: but the letter, containing those notes and bills, did not arrive in *London* until *Monday*, and, the intestate having died on the intervening *Sunday*, those notes and bills were received by his administrators. An action was brought by the holders of the bills, drawn by *Illingworth*, and accepted by the intestate, and a judgment was obtained by them.

Illingworth claimed the last remittance before the Master, as having been remitted to the intestate for a special purpose; to which it was not applied.

Under these circumstances the Master stated, that, it having been submitted to him on the part of *Illingworth* and the bill-holders, that, as the 218*l.* 15*s.* was remitted for the express purpose of answering the acceptances on the
[120] bills, drawn by *Illingworth*, and as the same never came to the hands of the intestate, it was not part of his general property, but was applicable only to the general purposes for which it was remitted, and ought to be paid to the bill-holders, or repaid to *Illingworth*, he was of opinion, it did not form part of the personal estate of the intestate; and therefore had not charged the Defendants, the administrators, with the amount.

No exception was taken to this report; but by consent, to save expense, the objection was brought before the Court, upon a petition, by the bill-holders, with the assent of *Illingworth*, praying, that the stock, in which the remittance of 218*l.* 15*s.* had been invested, may be paid to the petitioners.

Mr. Alexander, in support of the Petition, and Mr. Roupell, for the Administrators, contended, that this was an appropriation of a fund; which was not applicable therefore

(1) See *Stevenson* v. *Pemberton*, 1 Dall. 3. *Sharpless* v. *Welsh et al.* 4 Dall. 279.

to any other purpose, that the holders of the bills accepted by the intestate, had, as standing on the right of *Illingworth*, a clear lien upon the bills and notes, remitted by him for the specific purpose of answering those bills, that remittance never having got to the hands of the intestate, and further, that, if the bills remitted had got to his hands, and he had become insolvent, remaining, in specie, undisposed of for the specific purpose of the remittance, the lien would have prevailed. 1806. HASSALL v. SMITHERS

Mr. Johnson, and Mr W Agar, for the Creditors of the Intestate.—This claim is raised upon the mere ground, that this remittance was for a specific purpose, and clothed with a trust, in whatsoever hands the bills were It is not contended, that they were *in transitu*, and, with the exception of cases of that sort, the remittance is made from the moment it is put in the post. The possession of the representative was the possession of the intestate himself If the question depends upon the specific purpose, a previous remittance for the same purpose stands upon the same principle, but it cannot be pressed to that extent If this fund could be considered subject to a trust in the hands of the intestate, great inconvenience and difficulty would arise Suppose the bills, on account of which this fund was remitted, had been dispersed in fifty hands, and due at different times. for whom is the trust, which could only arise upon relieving him from his acceptances to the extent of that fund? [121]

Mr. Alexander, in Reply, was stopped by the Court

The MASTER *of the* ROLLS —I perfectly agree with the Master upon this point There was no dealing between these parties, except this dealing in bills by drawing, accepting, and remitting to answer the acceptances *Illingworth* was bound to provide for the bills drawn by him He remits a certain sum, to be applied, as far as it will go, to the discharge of those bills. Clearly the intestate was bound so to apply that remittance, if it had got to his hands. He had no option, even if he had been a creditor at the time upon other accounts, to apply that fund to any other demand, for *Illingworth* had a right to prescribe in the first instance, in what manner, and to what account, the remittance should be applied (1) If the intestate had been a Bankrupt, property in his hands under such circumstances would not have passed to his Assignees, but would have been applicable to the bills, to answer which it was specifically remitted. The representatives cannot be in any better plight than the intestate himself would have been in [122]

(1) *Mayor of Alexandria v. Patten*, 4 Cranch 317 *Field v. Holland*, 6 *Cranch*, 8 *Cremer v. Higginson et al* 1 Mason's Rep 324

1806.

HASSALL v. SMITHERS

They have no election to consider this remittance, not as a fund applicable to the bills outstanding, but as part of the general assets. They are bound to apply it for *Illingworth*. Then the bill-holders desire, with the assent of *Illingworth*, to have it applied in discharge of these bills; and he joins them in that request: and that avoids the question upon the strength of their own claim to insist upon the application; for there can be no doubt, that there is in them, and him, joining them, a complete right to insist upon the application, that he originally prescribed; and, if it were otherwise, the grossest injustice would be the consequence; for that would be an application of *Illingworth's* money, not in executing the purpose, for which he made the remittance, but to pay other debts of the intestate. If *Illingworth* had delayed the remittance another day, the money would have been in his own pocket, and the application desired is the same as taking it out of his pocket to pay the debts of the intestate. *Illingworth* had no intention, and did no act, to put this property in the hands of the intestate, except as clothed with a trust, more than if it had remained with him.

Declare, that this fund is not part of the general assets of the intestate; but is applicable to the bills, held by the petitioners.

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ROLLS. *Feb.* 11. 14.

MOCATTA *v.* LONSADA.

Appointment of 100*l.*, out of 2500*l.*, *viz.* to two children, one-third each the remaining third to the children of another child, (the power extending to their issue,) and 2400*l.* equally to two children the only other objects, established, the Court refusing to go further against an appointment, as illusory, than actually decided.

ABIGAIL BARUH LONSADA by her will, reciting that her father had bequeathed to her the interest of 2500*l.* for her life; and directed, that after her decease her then present children by her late husband, and their issue, should have the said 2500*l.*; to be paid to them at their ages of 21 years, or day of marriage, which should first happen, in such shares and proportions as she (the testatrix) should by her will direct, limit, or appoint; gave and bequeathed 100*l.*, part of the said 2500*l.*, to her daughters *Esther Baruh Lonsada*, and *Rebecca De Aguilar*, and the children of her late daughter *Rachael Baruh Lonsada*: that is to say, one third part of the said 100*l.* to her daughter *Esther Baruh Lonsada*: one other third part thereof to her daughter *Rebecca De Aguilar*, and the other third part thereof to the children of her late daughter *Rachael Baruh Lonsada*, deceased; and the testatrix gave the residue and remainder of the said 2500*l.* unto her two sons *Emanuel Baruh Lonsada* and *Isaac Baruh Lonsada*, share and share alike, as tenants in common.

1806.

MOCATTA v. LONSADA.

The object of the bill was to set aside the appointment; and the only question was, whether it was void, as being illusory. It was suggested at the Bar, that some of the objects of the appointment had another provision: but the fact did not appear.

Mr. Romilly, and Mr. Toller, for the Plaintiffs, admitting, that the share, given to the children of *Rachael Baruh Lonsada*, was to be considered as one entire sum, not according to the actual division of it among her three children, contended, that this appointment is illusory; that in the case of *Butcher* v. *Butcher*, (a) *The Master of the Rolls* professing to go, not upon the relative proportion, but upon the positive amount of the sum, and disapproving the doctrine, yet considered himself bound to follow it to the extent, to which it had gone; though not to carry it further; that in *Kemp* v. *Kemp*, (b) the sum to be distributed being only 1900*l.*, Lord *Alvanley* thought 50*l.* illusory; and in this instance the very unequal distribution is not justified by any circumstances; as misconduct, &c.

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Mr. Heald, for the two sons of the testatrix, Defendants.—Though the prevalence of this rule has been from time to time lamented, no Judge before the judgment in *Butcher* v. *Butcher* has given the means of rendering it less perplexed. That judgment does afford a ground of decision, adapted to a variety of cases, and governing this. Lord *Alvanley's* opinion in *Kemp* v. *Kemp* as to the 50*l.* has not the authority of decision; the whole appointment failing by the attempt to give 10*l.* There is no case to be found, in which the sum of 30*l.* has been held an unsubstantial share. The largest sum, to which this doctrine has been actually applied, is ten guineas.

The MASTER *of the* ROLLS.—Lord *Alvanley* seems always to have held, that, if a person, entrusted with the power of appointment, had made a provision of a different sort for an object of the power, that would be a good reason for either omitting that object altogether, or for giving merely a nominal share. In *Spencer* v. *Spencer* (a) his Lordship says, if the child is already provided for, he desires it not to be understood as his opinion, that in such a case the party would be bound to give that child any thing. (b)

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But, independent of the circumstances, being still unable to discover any rule, by which I can ascertain, what is an illusory share, I adhere to the rule I laid down in *Butcher* v

(a) *Ante*, vol. ix. 382. *Bax* v. *Whitbread, ante*, vol. x. 31.
(b) *Ante*, vol. v. 849. (a) p. 125. *Ante*, vol. v. 862.
(b) p. 125 In *Kemp* v. *Kemp, ante*, vol. v. 849 (see page 861.) Lord *Alvanley* repeats this proposition, with the qualification, expressed by *The Master of the Rolls* in this case, that the provision is derived from the person executing the power, as in *Brisco* v. *Warde, ante*, vol. ii. 336.

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MOCATTA v. LONSADA

Butcher; (*c*) that I will go as far as I am bound by authority, but no further. Show me a case, in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held to be illusory, and I will in the same case make the same decision. But, where I am deprived of the guidance, or freed from the compulsion of authority, I will not hold any appointment to be invalid upon that ground of objection.

The case of *Kemp* v. *Kemp* (*d*) is not an authority for this case; for the discussion of that turned, not upon the 50*l.*, but upon the 10*l.* All, that is decided in that case, is, that the appointment of 10*l.* was under the circumstances illusory. But it must be recollected, with how much doubt, and after how much hesitation, Lord *Alvanley* came to that determination. His Lordship at the close of his judgment says, it is given with less satisfaction than any judgment he ever gave.

[126] Therefore I must hold this appointment to be good; adhering to the rule I laid down in *Butcher* v. *Butcher*; for this sum of 33*l.* 6*s.* 8*d.* is not the same specific sum, or the same proportion of the share of each child upon an equal division, that has been in any former instance held to be illusory. (*a*)

(*c*) *Ante*, vol. ix. 382. (*d*) *Ante*, vol. x. 849
(*a*) *Dyke* v. *Sylvester* the next case.

ROLLS. *March* 14.

DYKE *v.* SYLVESTER.

Appointment of 5500*l.* to one child, 1100*l.*, to another, and 500*l.* among the others, seven in number, held not illusory: the Court refusing to go farther upon that subject than actual decision.

THE bill prayed the specific performance of an agreement for the sale of an estate to the Defendant; who took an objection to the title, as being derived under an appointment, subject to be impeached, as illusory: an estate of the value of 5500*l.* being appointed to the eldest son; another estate, valued at 1100*l.* to the second son; and another of the value of only 500*l.* equally among the other children, the remaining objects of the power, seven in number.

The Solicitor-General, (*a*) *and Mr. Leach, for the Plaintiff*, declined to argue the question, after the late decisions of *The Master of the Rolls* in *Butcher* v. *Butcher*, (*b*) *Rax* v. *Whitbread*, (*c*) *Mocatta* v. *Lonsada*; (*d*) merely observing, that though no motive for the disproportion appeared, the shares of the younger children, 71*l.* to each, was clearly

(*a*) Sir *Samuel Romilly*. (*b*) *Ante*, vol. ix. 382. (*c*) *Ante*, vol. x. 31.
(*d*) *Ante*, the preceding case.

1806.

DYER v. SYLVESTER.

more that had been decided to be illusory; whether considered positively, with *reference to the whole fund, or to the proportion upon an equal division.

Mr. Richards, and Mr. Gregg, for the Defendant, suggested, that there might be more children.

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The MASTER *of the* ROLLS.—I must adhere to the opinion I have so frequently expressed, until I am corrected by higher authority. There is nothing in the objection, that there may be more children: there is so little probability, under the circumstances, that the shares will ever be reduced below the standard, under which I have said, I should consider myself bound by the authorities.

A specific performance was decreed accordingly.

DORNFORD v. DORNFORD. (1)

ROLLS. *February* 11.

Executor, under a direction to accumulate, having become a Bankrupt, his estate was charged with interest at 5*l. per cent.* with rests. (2)

AN executor in trust, with a direction to accumulate, having become a Bankrupt, a claim was made against his estate of interest, at the rate of 5*l. per cent.* with rests, upon the principles of the late case of *Raphael* v. *Boehm*. (*a*)

Mr. Richards, and Mr. Romilly, for the Plaintiff.—The Bankruptcy makes no difference. If the executor had died, under such a direction, his estate would have been charged. The objection is, that interest is *not given in the case of a Bankrupt in respect of a note; upon which interest would be given by way of damages, though not by the contract. This is not a case of that description; but an implied contract; an executor accepting the trust upon the terms proposed. As to the rate of interest, if he had done his duty, he would have saved 5*l. per cent.* to the estate; at which rate of interest debts were outstanding.

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Mr. Martin, for the Defendants.—In the administration of the assets of a Bankrupt, or a person deceased, one class of creditors is not put on a better situation than another. In *Raphael* v. *Boehm* (*a*) the executor, instead of accumu-

(*a*) *Ante*, vol. xi. 92. The decree in that cause has been since affirmed upon a re-hearing. *Post.* {vol. xiii, p. 407. 590.}

(*a*) p. 128. *Ante*, vol. xi. 92.

{(1) Cited, 1 Johns. Cha. Rep. 627.}

{(2) See the note to *Waring* v. *Cunliffe*, *ante*, vol. 1, p. 99.}

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lating the balances, received by him under a special trust, employed them in his trade. But this is only the balance of the general account, not a special trust. A residue has never been declared to carry interest in preference to the other debts by simple contract, merely upon the omission to lay it out.

Mr. Richards, in Reply.—Interest in this Court is given, not by way of damages, but as being due; and therefore is given as well against a Bankrupt estate as any other. He receives the interest, as interest, upon a trust to lay out. In *Ex parte Brooke*, Lord *Eldon* charged the estate of an executor, who became Bankrupt, with interest, as part of the debt; as being interest due by the nature of the contract, in respect of the trust imposed upon him.

The MASTER *of the* ROLLS.—The direction to accumulate is as imperative in this case, as it was in *Raphael* v. *Boehm;* directing accumulation of the interest; and even when 50*l.* shall be collected. It struck me, that the circumstance, that this happens to be a question arising with Assignees after the Bankruptcy of the executor makes no difference; for the question is, what is the obligation which this Court attaches upon the breach of such a duty. That obligation is equivalent to the contract of the part. This Court says, "if you neglect your duty, and keep the mo-
"ney yourself, your obligation is to put the infant in the
"same situation, as if you had not done so." The Court does not inquire into the particular benefit, that has been made; but fastens upon the party an obligation to make good the situation of the *cestuy que trust*. That is just the same thing as an engagement. If the Bankrupt had entered into that engagement, could there be a doubt, that the mode, in which the debt would have been calculated at the date of the Bankruptcy, would have been by ascertaining, what would have been the amount of the debt, supposing the direction had been complied with? This is not like the case, where this Court imposes upon a man, who has given a note, not bearing interest, the obligation to pay interest. The utmost the Court does in the administration of assets is to follow the Law; and, if interest would be given at law in the shape of damages, the party, claiming against the assets in this Court, shall have the sum, which he could have recovered at Law. The case is perfectly different, where the Court by its particular rules says, the obligation immediately attaching upon the neglect of duty is an obligation to make compensation for the consequences. It has the effect of contract. If it was proved, that the Bankrupt had in his hands, the day before the Bankruptcy, a sum equivalent to what would have been the accumulation, there is no doubt, that sum would be the property of the

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cestuy que trust; who would therefore have a right to get it out of the hands of the Assignees.

Upon principle therefore the Bankruptcy in this case makes no difference: but the case *Ex parte Brooke*, if so decided, fortifies the judgment.

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DONNISON v. DONNISON.

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BARNETT *v.* WESTON.

ROLLS. *Feb.* 14.

The right of the first mortgagee, with the legal estate, to tack as against mesne mortgagees, does not cover a mortgage of the equity of redemption, coming to him as executor.

To postpone the first mortgagee on the ground of leaving the title deeds in the possession of the mortgagor, the case must amount to fraud. (1)

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BY indentures dated the 1st of *May* 1789, *John Brooke* assigned leasehold estates, by way of mortgage, in consideration of 3000*l.*, to *Samuel Barnett*, his executors, &c. for the residue of existing terms of 99 years.

Barnett afterwards lent *Brooke* the further sum of 500*l.*, upon the security of the same premises; which were charged with that sum and interest accordingly by indentures, dated the 22d of *October* 1790.

By indentures, dated 1st of *March* 1791, the premises were made a collateral security for the sum of 4500*l.*, lent by *Samuel Barnett* to *William Windsor*, at the instance of *Brooke*; and it was declared, that the premises should be charged as a collateral security with that sum, as well as the sums of 3000*l.* and 500*l.*

By indentures, dated the 28th of *January* 1792, the same premises were made a collateral security, subject to the said several incumbrances, for the sum of 4000*l.*, lent by *William Barnett*, the brother of *Samuel*, to *Brooke* upon a mortgage of a freehold estate.

Upon the 20th of *November* 1790, *Brooke* mortgaged the premises for a term of years to *Charles Henry Hunt*; and upon the 26th of *November* 1791 made another mortgage of them to *Thomas Sadler*.

William Barnett died in *September* 1798. *Samuel Barnett* was his executor. *Samuel Barnett* died in *April* 1803. In 1793 *Brooke* became a Bankrupt. The bill was filed by the executors of *Samuel Barnett*; charging, that *Samuel* and *William Barnett* had not, at the execution of their mortgages, or when they advanced their money, any notice of the mortgage to *Hunt*; and insisting, that *Samuel Barnett* was entitled in his own right to tack his mortgage of the 1st of *March* 1791 to his prior securities of the 1st of *May* 1789, and the 22d of *October* 1790, and to be paid the whole in preference to *Hunt's* mortgage, and also, that he was, as executor of his brother, entitled in the same man-

(1) *Berry* v. *Mutual Ins. Company*, 2 Johns. Cha. Rep. 603.

1806. ner to tack his brother's mortgage of the 28th of *January* 1792, in preference to *Hunt*; praying that *Hunt's* mortgage may be postponed accordingly.

BARNETT v. WESTON.

The Defendant *Sadler* by his answer stated, that *Brooke* represented to him, that there were not any incumbrances whatever affecting the premises; and as a proof produced the original lease, and the several assignments; representing, that as they related to his other leasehold property, which was considerable, and he should have occasion for them in granting building leases, &c. he could not part with them; upon which representation the Defendant did not require a deposit of them; but was content with attested copies, and he insisted on a preference; as *Samuel Barnett* had by lending the deeds to the mortgagor enabled him to practise a fraud.

[132] *Mr. Richards, and Mr. Horne, for the Plaintiffs*, insisted upon the right to tack: *Samuel Barnett* having the legal estate; and making further advancements, without notice, previous to his last advancement, of any security existing in any person; contending also, that this would cover the sum advanced by *William Barnett*, the legal and equitable right to which were by accident vested in the same person.

Mr. Fonblanque, and Mr. Cooke, for the Assignees of Hunt, the subsequent Mortgagee, gave up the point as to the right of *Samuel Barnett* to tack: but, as to the right claimed in respect of the advance of *William Barnett*, insisted, the claim of preference could not be maintained. The Plaintiffs, as representing *Samuel*, have the legal estate: but, as representing *William*, they are entitled to no more than the equitable interest. The right to tack stands upon this reason only; that, if a person, having the legal estate, is induced, upon the faith of that security, to lend more money without notice of a subsequent mortgage, a Court of Equity will not deprive him of the advantage of his legal security. But the interest of *Samuel Barnett* in the money advanced by his brother is in *autre droit*. As to that, *Samuel* can stand in no better situation than *William* would; who must have known, he was lending money upon the security of an estate of which he had not the title-deeds; and the accident, that *Samuel* became the representative of his brother, cannot make a difference.

Mr. Alexander, and Mr. Raynsford, for the Defendant Sadler.—There is no instance, that a person, taking two mortgages in different rights, has been able so to connect them as to squeeze out mesne mortgagees. What equity [133] have these Plaintiffs, who may have no beneficial interest, but be mere trustees for other persons, to say, the Defendants shall not redeem them, as representing *Samuel Barnett*, without also redeeming them as representing *William Barnett*? Can a subsequent mortgagee, by devising in trust for

his own heir to the first mortgagee, or in the case of a term for his next of kin, obtain a priority? A third mortgagee, who has honestly advanced his money, may buy in the first mortgage, and cut out the second: but the principle of that case does not warrant this. 1806. BARNETT v. WESTON.

Another objection is, that the first mortgagee permitted the mortgagor to keep the title deeds, which he produced to this Defendant, as evidence, that there were no encumbrances.

The MASTER *of the* ROLLS observing upon the last point, that the old cases for postponing the first mortgage under those circumstances, unless a case of fraud could be made out, had been shaken, *(a)* that point was given up.

Mr. Richards, in Reply.—In the absence of authority on both sides, the principle extends to all these subsequent advances. The ground upon which a mortgagee, having the legal estate, and securities, which without that estate he could not have preferred, is allowed to avail himself of the legal estate to protect those subsequent securities, if taken without notice of prior encumbrances, is, that at Law they cannot succeed against him; and in Equity each person [134] lending money being equally meritorious, neither having notice, Equity will not interfere against the Law. These Plaintiffs, having the legal estate, cannot be affected at Law; and they have all these securities united in them: that of *William Barnett* under an assignment by Law. The circumstance, that the security was not taken originally by *Samuel Barnett*, makes no difference. It is sufficient to show an assignment *bonâ fide;* and the Court will not compel a discovery for whose benefit it was taken. It is sufficient, that the Plaintiffs take as owners for themselves, or others. This, being a mortgage of a term, vested in them as executors: as did the right to the money. The whole security therefore is in them; and the Court will not look into the will of *William Barnett* to determine the real interest: the person having the security being the party to avail himself of it; to file a bill of foreclosure, and to be the Defendant to a bill of redemption. The right to unite these securities is therefore as strong, as if they had all been those of *Samuel Barnett* himself. The Court cannot know, that he has not specifically disposed of by will the very security, the right to unite which is admitted.

The MASTER *of the* ROLLS.—It is surprising, that no authority can be produced; for this must have happened before. Upon the question as to the security of *William Barnett*, it is clear, he obtained nothing but a mortgage of an equity of redemption. At the moment of taking that

(a) See *ante*, vol. vi. 185, 190, in *Evans* v. *Bicknell.*

1806.

BARNETT v. WESTON.

Preference of a mortgagee of the equity of redemption, getting in the legal estate.

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he was posterior both to *Hunt* and *Sadler*; and in that order he must have been content to be paid; if a bill had been filed by the first mortgagee for the purpose of compelling a redemption. The law of this Court gives a person, who has obtained a mortgage of the equity of redemption, * this chance; that he may get in the legal estate, if he can; and, if he does get it in, the legal estate being united to his equity of redemption, he would have a priority over all the mesne mortgages. But has that ever taken place? *William Barnett* never got the legal estate. Nor did any executor of him ever get it; for *Samuel Barnett* did not get it as his executor; but had it in himself in his own right, before *William Barnett's* mortgage had any existence: and nothing has happened since to vary the rights, *Samuel* still retaining the legal estate: *William* at the time of his death having only the equitable estate. The legal estate never passed to *William*, or to any representative of him; but stands in *Samuel's* own person; and the equitable right in *William's* representative. The mere circumstance, that the person, having the legal estate, happens to be the representative, cannot make this difference. It is just the same as if the estates were in two different persons: being in the same person in different capacities: the legal estate in his own right: the equitable interest in the right of his brother. The legal and equitable estates cannot unite to the effect of squeezing out (as it is expressed) mesne mortgagees. But, as no authority is produced on either side, I wish to see, whether any decision has taken place upon this question, and, whether it has ever been discussed. If I find any thing upon it, I will mention it. As to all *Samuel Barnett's* own mortgages, the Plaintiffs of course are entitled

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The cause was not mentioned again

1806.

ROLLS.
Jan. 7. Feb. 18.
Ante, vol. i. 436.
Vol. ii. 267.

KIDNEY *v.* COUSSMAKER. (1)
WILLIAMS *v.* COUSSMAKER.
WILLIAMS *v.* KIDNEY.

Widow not bound by election made under a mistaken impression of the extent of the claim against her.

The doctrine of election not applicable against creditors, taking the benefit of a devise for debts, and also inforcing their legal right against other funds disposed of by the will.

Settlement after marriage fraudulent only as against creditors at that time. (2)

The settlement coming out in the answer to a bill by creditors, claiming under a devise for debts, they are entitled to an inquiry.

Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts, will include copyholds, if required, and the want of a surrender will be supplied.

BENJAMIN KIDNEY by his will, after giving directions concerning his funeral and the erection of a monument, gave, devised, and bequeathed certain estates in the Counties of *Northampton*, *Bedford*, *Huntingdon*, and *Leicester*, and in *London*, and all his other messuages, lands, tenements, and hereditaments in the said several Counties of *Northampton*, *Bedford*, *Huntingdon*, and *Leicester*, or elsewhere in *Great Britain*, except the estates hereinafter given to his wife for life, to the use of trustees, their heirs and assigns for ever, upon the trusts after mentioned; *viz.* upon trust to sell and dispose of the produce to such person and persons, and in such manner, as after mentioned: 1st, to discharge "all principal money and interest due and owing to "any person or persons for and upon any mortgages or incumbrances subsisting upon and particularly affecting the "same estates at the time of my decease; as the same estates are thereby severally charged and chargeable; and "shall and do place out and invest all the overplus of the "money arising by * such sale or sales, as aforesaid, after "deducting their charges in the execution of the aforesaid "trusts, in government securities, or in any of the public "funds in their names, &c. in trust for such person and "persons, in such proportions, and in such manner and "form, in all respects, as I have hereinafter directed of "and concerning the residue of my personal estate; it being my intent and meaning, that such overplus money "shall go with and be considered as part of the residue "and surplus of my personal estate."

The testator then recited, that he and *William Nutt* had under the will of Sir *R. K.* a sum of 1000*l.*, another of 700*l.*, and another of 500*l.*, in trust to be laid out in government securities; and that the dividends should be paid to three persons respectively for their lives; and that after the decease of each respectively the principal should be considered as part of the testator's personal estate. Then taking notice, that those sums were not so laid out, but that he had paid interest at the rate of 4*l. per cent.* to annuitants

In this instance the intention to subject the copyhold estate appeared in other parts of the will.

Laches not to be imputed to creditors, under a devise for debts, as to an individual devisee, to prevent or limit the account of rents and profits, even against an infant heir.

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(1) Cited, and remarked upon, 3 Johns. Cha. Rep. 499.

(2) See the note to *Lush* v. *Wilkinson*, *ante*, vol v. p. 384.

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in respect of them, he directed his executors, as soon as conveniently could be after his decease, to raise out of his personal estate those three sums, and to invest them in government securities for the uses of Sir *R. K.'s* will.

The testator then confirmed the settlement, made upon his marriage with his wife *Elizabeth*; and ratified and confirmed to her all sum and sums of money, given or bequeathed by relations or friends, which is, are, or shall be, invested in the public funds, or laid out upon any Annuity in her own name, or in the name or names of him and his wife, or of any person or persons in trust for her. He then gave several messuages in *London* to his wife for life; and,

[138] if they should fall short of producing annually 400*l.*, gave a direction, expressed in the following terms:

"That the deficiency, if any, shall be made up to her out "of the interest, dividends, and produce, of my personal "estate: it being my will and meaning, that my wife shall "always have and be entitled unto an annual income of not "less than 400*l.* for her life, to be issuing and payable, as "aforesaid."

He further directed, that, if the rents should exceed 400*l.*, his wife should be entitled to the full benefit and income thereof. He then made some specific bequests to his wife and his two daughters; and declared, that the provision in his marriage settlement and by his will made for his wife shall be in lieu, bar, and full recompense and satisfaction, of and for all dower or thirds, free bench, or other customary estate whatsoever, which his said wife could claim or be entitled to out of any part of his freehold, copyhold, or customary, estates; and that, unless she shall within three months after his decease release to his executors all her right of dower and thirds, free bench, and customary estate whatsoever, in his freehold, copyhold, and customary estate, all the provision hereby intended for her shall cease, except the legacy of 200 guineas. He gave the remainder in the freehold part of the messuages she had for life, and all other his freehold, copyhold, and customary, messuages, lands, &c. not before mentioned and devised, to his two daughters, *Christian* and *Elizabeth*, as tenants in common in tail, with benefit of survivorship; and in default of issue of both, to his own right heirs. He then gave the leasehold part of the premises, given to his wife for life, after her decease, to his two daughters, equally, their executors, &c. for the remainder of the term he had therein; and, af-

[139] ter giving powers of leasing to his wife, and some legacies, he gave and bequeathed to the same trustees in the following terms:

"All the rest residue and surplus of my personal estate "after payment of my debts funeral charges the expenses "of proving this my will the expense of a monument and

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"legacies aforesaid in trust to place out and invest the "same in government securities or in any of the public "funds in their names in trust that they and the survivors "and survivor of them and the executors and administra- "tors of the survivor do and shall out of the interest divi- "dends and produce of my said residuary trust estate pay "to my wife *Elizabeth Kidney* yearly and every year dur- "ing her life such an annual sum of money as will in addi- "tion to the yearly rents and profits of the said messuages "&c. in *Lawrence Poultney Hill* &c. make up the sum of "400*l.* clear of taxes &c. such annual sum to be paid to her "during her life quarterly and upon this farther trust to "pay out of the interest dividends and produce of my said "residuary estate yearly such sum or sums of money as "they shall think proper," not exceeding 200*l. per annum* one year with another for each, for the maintenance and education of his two daughters until the age of 21; and upon further trust to transfer and pay all and every part of his "said residuary estate," subject to his wife's life interest in that annual payment to make up the deficiency before mentioned, to his two daughters in moieties at the age of 21 or marriage, if with consent of his wife and trustees, with benefit of survivorship in case of the death of either under 21, or unmarried; and, if both die under 21 and unmarried, he directed, that his "said residuary estate," subject to such annual payment or allowance as aforesaid for her life to his wife, shall go and be distributed unto and among such person and persons who will be then entitled to the same, according to the Statute of Distribution of Intestates' Estates; and declared, that in the mean time and until the messuages, lands, tenements, and hereditaments, in the Counties of *Northampton*, *Bedford*, *Huntingdon*, and *Leicester*, and in *London*, before mentioned and directed to be sold, shall be sold, the rents and profits of the same estates shall be applied in the first place in discharge of the interest due and to grow due upon the respective mortgages thereof; and that the overplus of such rents and profits shall from time to time be applied for such person and persons, and such uses, intents, and purposes, as is hereinbefore mentioned and directed of and concerning the interest, dividends, and produce, of his "residuary personal estate." He then appointed the trustees named in his will to be his executors; giving them the usual powers to change the funds; and directing them to reimburse themselves out of his "residuary estate" their costs.

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The decree, pronounced by Lord *Thurlow* in the two first of these causes, *(a)* declaring, that the money raised by sale of the testator's real estates, devised in trust to be sold, and

(a) See the Reports, *ante*, vol. i. 436. Vol. ii. 267.

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the rents and profits were to be considered as equitable assets, and liable to answer the deficiency of the personal estate to pay the debts, having been affirmed upon a re-hearing by Lord *Rosslyn*, and upon appeal to the House of Lords, the causes came on for further directions upon the Master's report; by which it appeared, that there was still a deficiency for the debts without applying the estates devised to the wife and daughters; and that the testator was at
[141] his death, besides the estates sold, seised of other freehold and copyhold estates.

The third cause was instituted upon a supplemental bill by the creditor, who was the Plaintiff in the second cause, stating the proceedings in the other causes; and that the testator was seised of a copyhold estate not surrendered to the use of his will; and that his daughter, the Defendant *Christian Kidney*, upon the death of her sister as customary heir received the money produced by the sale and the rents and profits.

The supplemental bill further stated, that by the settlement, previous to the marriage of the testator, dated the 27th and 28th of *July* 1768, in consideration of the marriage portion of 6000*l.*, and for making a provision for *Elizabeth Kidney*, in case she should survive her husband, and for the issue, and also in consideration of such further advancement and benefit in money, lands, or otherwise, as might arise to *Benjamin Kidney* by the intended marriage, &c. certain premises were settled upon the husband and wife successively for life, with remainder to the issue of the marriage, and the ultimate remainder to the husband in fee; and leasehold premises were settled also upon the husband and wife successively for life, with remainder to the issue, remainder to such persons as he should by deed or will appoint, and he covenanted, that in case by death, or gift of relations or friends, or otherwise, the said *Elizabeth* or *Benjamin Kidney* in her right by the marriage should have or become entitled to any further increase or acquisition of fortune, either in lands, &c. freehold, copyhold, or leasehold, or in money, estate, or effects, he, his heirs, executors, &c. would settle such further acquisition, as to one third upon the
[142] trusts declared concerning the freehold and leasehold premises settled, and that the other two thirds should go to such persons and uses, &c. as *Benjamin Kidney* should by deed or will appoint; and, for want of appointment, to his heirs, executors, &c.

The bill further stated, that *Bartholomew Pomeroy*, the father of *Mrs. Kidney*, by his will in 1778, gave one third part of the surplus of his personal estate to his wife: one third to his three children equally, and the residue of the remaining third, after some legacies, as to one third to his wife, and two thirds to his three children equally.

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The bill then stated, that *Benjamin Kidney* did not reduce into possession any part of the share of *Elizabeth Kidney*, to which he was entitled by the settlement; and that the daughter, *Christian Kidney*, claims as tenant in tail in consequence of the death of her sister the premises in *London*, which were part freehold and part leasehold, subject to the estate for life of her mother. The bill prayed an account of the money, received by the Defendant *Christian Kidney*, on account of the produce of the sale, and of the rents and profits of the testator *Benjamin Kidney's* said copyhold estates, to be applied in aid of the funds for payment of the debts; and that *Christian Kidney* may be decreed to account for the same with interest; an account for the same purpose of the share of the residue of *Pomeroy's* personal estate: an account of the freehold and leasehold estates in *London* devised and bequeathed by the testator *Kidney* to his wife for life; that those estates also may be subject in aid in the same manner, and for that purpose an account of the rents and profits received, and a sale of those estates; the bill insisting, that the testator by his marriage settlement became a purchaser of two third parts of the share of his wife in the residue of [143] her father's personal estate, and though the testator did not reduce that into possession, it became part of his personal estate; and ought to be applied in aid of the funds for his debts, that the bond creditors having been paid to a great extent out of the personal estate, which was insufficient for the simple contract debts, the real estates, devised to the Defendant *Elizabeth* for life, are liable to refund to the personal estate so much as it contributed to the specialty debts; and that the release of dower, thirds, and free bench, executed by the Defendant *Elizabeth*, as required by the will, was a nullity, as the testator was not at his death seised of or entitled to any freehold estate, whereof she was dowable.

The answer of *Christian Kidney* stated, that by indentures, dated the 21st and 22d of *November* 1769, subsequent to the marriage of the testator, a freehold estate, purchased by him for 700*l.*, was settled to the use of himself for life, with remainders to his wife for life, and to the issue of the marriage, and, in default of issue, according to his appointment: in default thereof, for his heirs. The Defendant insisted, that these indentures were good against the creditors; and the Defendant, as the only surviving issue, claimed under them, and also, as tenant in tail, after the death of her mother the freehold estates, comprised in the settlement, and the leasehold estates, in settlement, absolutely; being the only child, that lived to attain the age of 21; and she submitted, whether the said copyhold estates were by the will made liable to the debts.

The answer of the widow stated, that she apprehended, that testator at the time of making the purchase, which was

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the subject of the settlement after the marriage, was a person of very considerable property, and, * not in debt, except in his common course of business, as a merchant or trader. By deed poll, dated the 29th of *November* 1787, she released to the executors and trustees all her dower, thirds, &c.; [* 144] by which deed it was declared, that it should not bar or affect the provision or benefit by the settlement or will; or, to which she might be entitled out of the personal estate of her father by his will, or otherwise. She represented, that in case her interest in the freehold and leasehold estate of the testator, devised and bequeathed to her for life, is to be impeached, an inquiry ought to be made as to her right to dower in the freehold estates sold; and that she ought to have a compensation out of the produce; and she also claimed dower out of the freehold estates, last purchased by him.

Mr. Romilly, and Mr. Leach, for the Plaintiffs in the second and supplemental causes, the Creditors.—The settlement of 1769, being made after marriage, and without consideration, is void as against creditors. The question, now to be discussed upon the supplemental bill, is, whether the copyhold estate, not being surrendered, passed by the will. In favour of creditors the want of a surrender may be supplied; though copyhold estates are not mentioned in the will. Where a devise is for creditors, and such general words are used, either by a direction for sale or by way of charge, an intention to devise the copyhold estates as well as freehold is presumed; and therefore the want of a surrender will be supplied. That is not done in favour of a wife or children; unless there is an express devise for them. The distinction, though frequently treated as capricious, stands upon extremely good reason; that in the case of wife or children the intention cannot be understood or presumed [145] to be to devise those estates. Where a testator is about to satisfy the moral obligation to provide for a wife or children, it is impossible to say, to what extent he means to do so. He makes a provision for them by giving a freehold estate. They are by that disposition provided for; and it is impossible to say, upon what ground he intended to devise the copyhold estate, as well as the freehold. The obligation is vague, indefinite; and the extent unlimited. But in the case of creditors the moral obligation has a certain extent: viz. to pay all his debts. He says, he intends to satisfy that obligation. The precise purpose to pay all his debts is apparent: but all his debts cannot be paid without taking the copyhold as well as the freehold estates. A subsequent clause in the will shows clearly, that he intended his copyhold estates; and even conceived, that he had surrendered them. By that clause he gives the remainder in the freehold estates, devised to his wife for life, and all other his freehold, copyhold, and customary, messuages, and lands, not

before mentioned, and devised, to his daughter, in tail, with remainder to himself in fee. There is great inaccuracy certainly in this: the preceding part of the will having disposed of every thing, except what he had before given to his wife for life. But he clearly conceived, that his devise extended to some copyhold estates, and that the devise he had made would pass them.

But, upon authority also, it is settled, that a testator, charging his estates with his debts by the general description of all his real estate, or, all his messuages, lands, tenements, or hereditaments, shall be held to have intended to comprize copyhold estates; if his other estates are not sufficient for the debts; the case of the creditors being distinguished in this respect from that of a wife or children; where there is no determinate purpose, requiring the Court to include the copyhold estate. This was decided in *Drake* v. *Robinson*. (*a*) *Haslewood* v. *Pope*. (*b*) *Coombs* v. *Gibson*. (*c*) There is one authority, *Challis* v. *Casborn*; (*d*) which does not make the distinction between creditors, and a wife or children; but that case must be considered over-ruled by the two subsequent cases in *Peere Williams*, and *Byas* v. *Byas*; (*e*) which is an express decision against a wife upon that distinction; which prevails to a further extent; as, where the copyhold estate descends to an heir, altogether unprovided for: there is no doubt that it would be affected by debts; though certainly not for a wife or children.

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Mr. Alexander, *Mr. Hollist*, *and Mr. Trower*, *for Elizabeth Kidney*, *and Christian Kidney*, *the widow and daughter of the testator*.—The intention of the testator is clear, that his widow and family shall have this small part of his estates; and the creditors being, as far as they obtain satisfaction out of his real estate, mere legatees, cannot dispute any devise by his will, clearly intended by the testator. As to the equitable assets, the creditors are in the same situation as legatees; and the doctrine of election applies to them as much as to any other legatees. Therefore they can neither affect the leasehold or personal estate, nor the real estate by the means of marshalling. There is no authority upon this question; and upon principle why should they, taking a benefit under the will, reject the condition; which is, not merely implied, but expressed, in this instance? Taking the benefit of the wife's dower, can they dispute the particular provision substituted by the will for that, and at this time put an end to the election, that has been made? No case comes nearer to it than this. Where a devise is made for debts and legacies, both apparently put upon the same footing, yet it has been said, the debts shall have priority, to the extent even of exhausting the whole fund. That

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(*a*) 1 *P. Will.* 443. (*b*) 3 *P. Will.* 322. (*c*) 1 *Bro. C. C.* 273. (*d*) *Pre. Ch.* 407. 1 *Eq. Ca. Ab.* 124. *Gilb.* 96. (*e*) 2 *Ves.* 164

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however proceeds upon the supposed intention to arrange them according to their legal order; neither being entitled out of the real estate, except through the devise. The testator's object in making this provision for the creditors was, that the widow should take this property.

The next consideration is upon that part of the property, which is protected by the post-nuptial settlement: the creditors insisting, that they are entitled to defeat that settlement, if the testator was indebted at the time. Not one of these debts was contracted within years of that settlement. There is no foundation for presuming, that at that date a single debt existed. A creditor, impeaching a settlement upon that ground, must come here, proving, that there were debts at that time: otherwise the bill must be dismissed; for it is not the habit of the Court to direct an inquiry, in order to furnish a case for the Plaintiff. He must come with a case proved. If any inquiry could be directed, it should be, whether any of the debts now existing were due at that time. It is not enough to show, that he was a debtor at the time, in trade or in any other way. This depends upon the Statute of *Elizabeth*, (*a*) with reference to which the question is precisely the same, whether the party is in trade, or not: the case of Bankruptcy being quite distinct. It is not only necessary to show, that the debts now existing were existing at that time, but the
[148] relief is to be given only to such of the present creditors, who were creditors at that time; and subsequent creditors are not let in. There is no fraud upon any other creditors. The settlement cannot be held fraudulent against creditors, whose debts were not contracted at the time; unless a very particular case is made; as if the settlement was made with the object of contracting a great debt. In *Lush* v. *Wilkinson* (*a*) the inquiry, now pressed, was refused; and the bill was dismissed with costs; leaving the Plaintiffs to make a better case, if they could. That case is also an important authority as to the nature of the inquiry. Upon the other supposition no man could make a voluntary settlement; for there is no man, who does not owe something; and therefore, if a single debt is an objection, no voluntary settlement could stand. The question is, whether it was a fraud; and, whether the creditors were disappointed by that fraud: *Stephens* v. *Olive*. (*b*) In *Montague* v. *Lord Sandwich* (*c*) Lord *Rosslyn* made a declaration as to the extent of this doctrine; that the deeds of 1783 and 1787, were void as against the creditors of the late Earl of *Sandwich*, who were creditors prior to the dates of the said deeds; and directed an inquiry, whether the late Earl of

(*a*) Stat. 13 *Eliz. c.* 5.
(*a*) p. 148. *Ante*, vol. v. 384. (*b*) 2 *Bro. C. C.* 90.
(*c*) In Chancery, 22d *July*, 1797. Cited from the decree.

Sandwich was indebted previously to the date of those deeds respectively; and to what amount. In this case younger children were the Plaintiffs: not creditors; as in *Lush* v. *Wilkinson*, which shows the reason of that inquiry. If a creditor had been Plaintiff, and had not made out the case, the bill would have been dismissed. Upon this head therefore this bill must be dismissed; or an inquiry must be directed as to the debts due at the date of the settlement; and no other creditors are entitled to relief. 1806. KIDNEY v. COUSSMAKER.

Next, as to the copyhold estates, not surrendered to the use of the will: the widow is entitled to free-bench. The question, whether the want of a surrender is to be supplied against the heir, suggests the observation, that the decree, that has been made in these causes, is a very extraordinary decision; however considerable the authority; and, though we must give way to the authority, it is not easy to follow the reasoning; for it is clear, the testator intended, not, that the surplus should go as the residue of the personal estate; but, that it should go to the persons, to whom that is given, and in the same course. As to these copyhold estates, the first consideration is, whether he intended to pass them: the next, whether the want of a surrender ought to be supplied. In many cases, it is true, a distinction has been taken between creditors and a wife and children; but in those cases the consideration was, not a question of intention, but, whether the Court would act, or not; as in the instance, where the heir was unprovided for, &c. the Court will not interfere, and lend its aid, on account of the hardship. But this is a question of intention; and how can there be any difference of intention upon the same words? The only authority, that can be considered a decision, (the others being mere *dicta*,) is *Drake* v. *Robinson*; which seems to have turned upon the words "real estate." To that is opposed *Challis* v. *Casborn*: (*a*) an express decision upon the point. In this conflict of authority resort must be had to principle. If the court finds words, showing the intention to pass the copyhold estate, the want of a surrender must be supplied in favour of creditors against a wife or children, and even against an heir unprovided for. (*b*) It is purely a question of intention; and then the cases of creditors, wife, or children, cannot be distinguished. [149] [150]

It is perfectly settled, that these general words do not *primâ facie* import copyhold estate; but, to pass them, that intention must appear from circumstances. The state of the fund, and of the family, as a ground of construction, to raise an inference of intention, has been rejected in many instances; with the single exception, that the nature of the thing is examined; as, that there is no freehold estate.

(*a*) *Pre. Ch.* 407. 1 *Eq. Ca. Ab.* 124. *Gilb.* 96.
(*b*) See *Hills* v. *Downton*, *ante*, vol v. 557.

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But the Court has never permitted an examination into the amount of the debts; in order to ascertain, that there is not sufficient to pay them.

If the surrender is to be supplied, and the copyhold estates are not sufficient for the debts, the next question is as to the rents and profits; and in no instance of a surrender supplied has the account been carried back against the heir; which would be the utmost hardship. This family has been living upon the rents. The Court has never gone beyond simply supplying the surrender.

Mr Romilly, in Reply.—The doctrine is new, that every creditor, coming upon a fund, that is not by law liable, is to be considered as a legatee. As the testator has subjected to these creditors a fund, not subject by Law, is the Court therefore to presume, that what is sometimes called the natural and legal fund should not be liable? The doctrine of election has no application to this case. As to the settlement, it is true, *Stephens* v. *Olive*, and *Lush* v. *Wilkinson* establish, that it is not sufficient, that the testator was indebted at the date of the settlement, unless the debts existing at that time are still unsatisfied, or the man was insolvent at the time. With reference to that a case of difficulty might occur; where it could be shown clearly that he was indebted at the date of the settlement, that all those debts had been paid; but paid by the money borrowed from the Plaintiffs, filing the bill. In such a case the Court would have great difficulty in deciding that settlement not to be a fraud upon those Plaintiffs. *Lush* v. *Wilkinson* stood before the Court under very different circumstances. The single object of that bill was to set aside the settlement. The suit had no other purpose. The Plaintiff undertook to show, that the settlement was fraudulent. In this case all the circumstances, as to the settlement, arise upon the answer The Plaintiff in the creditor's bill knew nothing of it; and had no opportunity of going into the circumstances.

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As to the copyhold estate, *Drake* v. *Robinson*, *(a)* which is in a reporter of great authority, has never been disputed; and is subsequent in date to *Challis* v. *Casborn*. *(b)* Though there are questions, that the Court will not decide upon a will by the state of the property, there is no universal rule, that the court will not in any instance ascertain, what is the subject, and whether it will answer the purpose; where the question is, whether a particular subject passed by a will; or, where a particular purpose is stated to be in view; and in *Drake* v. *Robinson* an inquiry was directed, whether there was sufficient for the debts without the copyhold. *(c)*

(a) 1 *P. Will.* 443. *(b)* *Pre. Ch.* 407. 1 *Eq. Ca. Ab.* 124. *Gilb.* 96.
(c) *Andrews* v. *Emmot*, 2 *Bro. C. C.* 297

In *Rumbold* v. *Rumbold* (*d*) after a devise of estates, as well copyhold as freehold, this recital, "the copyhold part thereof having been previously surrendered * to the use of my will," was held an allegation, that he had surrendered them all; and it was of no consequence that he had some, not surrendered; for being intended to pass, they would pass. As to the account of the rents, if the opinion of the Court is, that the testator intended to devise, from the instant of his death the heir is a trustee. (*a*)

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The MASTER *of the* ROLLS.—These causes come before the Court upon a supplemental bill, filed by creditors, for the purpose of subjecting to their debts other property of the testator, their debtor, than was comprehended in the original decree. The question in the original causes seems to have been confined entirely to the surplus produce of the real estate, sold by the trustees under the will; and the point decided is, that that surplus produce was applicable to the payment of debts, generally: that is, that the real estates were to be considered as devised for the payment of debts. I suppose, it was then imagined, that the personal estate, and the produce of the real estate sold, would together be sufficient for the debts. It has turned out otherwise; and the creditor, having found other property, not comprehended in that decree, filed this bill, for the purpose of obtaining an application of that property. It consists of three descriptions: 1st, the share of the residuary estate of *Mr. Pomeroy*: to two-thirds of which the testator became entitled by his marriage settlement. As to that there is no question. The next description of property is the estate, devised to the wife for life, in order to raise a provision for her in lieu of dower. To this claim different objections are made on the part of the widow. First, it is said, it is inconsistent with the arrangement, that took place in the original causes; for, if this claim had been then set up, the widow would not have elected, as she did elect, to take the estate devised in satisfaction of her dower; and she had a right to an inquiry, whether she was entitled to dower or free-bench; and, what the value of the dower or free-bench was: that upon the supposition, that no such claim was to be made, she elected to take under the will, and to relinquish her dower, according to the condition imposed upon her by the testator. The right of the creditors must be now precisely what it was at the death of the testator; unless it can be shown, either, that they are barred by something, done in the original causes; or, that

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(*d*) *Ante*, vol. iii. 65. (*a*) See 2 *Atk.* 234. 3 *Atk.* 124, 125.

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they have in some way released and given up that right. Nothing was decided in the original causes, that bars their claim upon other property of the testator. Upon what ground can the Court say, they are to be contented with the estate, devised for payment of the debts; and are to be deprived of their legal remedy against the devised estates? The devisees cannot affect any right of the creditors. It is true, the arrangement made proceeds upon the supposition, that this property may not be called for by the creditors. But the consequence is only, that the widow will not be bound by any election she then made. The argument now must be upon the same ground, as if this claim had been then brought forward. She must be let in now to any of her legal rights; and an inquiry, in what estates she was entitled to dower or free-bench, her election, as being made under a mistaken impression, that the creditors were not to make any claim upon those estates, not binding her.

[154] Another objection, made for the widow, is, that the creditors take a benefit under the will of the testator by the devise for payment of the debts, generally; and therefore they shall not be permitted to disappoint that part of the will, by which a provision is made for the widow: that is, that the doctrine of election is to be applied to creditors. It is utterly inapplicable. It never has been so applied; and half the decrees upon marshalling assets are wrong, if there is any ground for that claim. It is true, creditors by simple contract cannot have any right, except by marshalling against the real estate; unless the testator thinks fit to devise it for satisfaction of the debts, generally: yet they have never been held to stand in the same light as legatees. When the testator lets in such creditors by a charge, it is now settled, whatever doubt may formerly have been entertained upon it, that creditors under a charge of debts and legacies are to be paid in preference to legatees; and, though the Statute of Fraudulent Devises would undoubtedly prevent a devise for payment of legacies, so as to disappoint creditors by specialty, it would not prevent a devise for payments of debts, generally; though the effect would be to let in creditors by simple contract, to the prejudice of creditors by specialty. *(a)* If there is any foundation for this doctrine of election, the case never could have happened; where there was a charge upon any part of the estate for debts; whereas the creditors by specialty are permitted, and the creditors by simple contract are by marshalling permitted, to follow the devised estates; if there are no

Distinction between creditors and legatees under a charge of debts and legacies. The former are to be paid in preference.

The Statute of Fraudulent Devises would prevent a devise for legacies to the prejudice of creditors by specialty; but not a devise for debts generally, though that might be the effect.

Under a charge of debts creditors by simple contract may by marshalling, follow devised estates; if no descended estates, or they have been applied.

(a) See *Rudout* v *Lord Plymouth*, 2 *Atk.* 104. *Lingard* v *Lord Derby*, 1 *Bro. C. C.* 311. *Hughes* v. *Dolben*, 2 *Bro. C. C.* 614

estates descended; or, if the descended estates have been applied. In this case the decree is wrong upon this doctrine; for the legatees are disappointed by the specialty creditors taking the personal estate.

It is then stated, that there is at least one part of this property, that cannot be affected, being in settlement. With regard to that part, that was settled before the marriage, the creditors do not attempt to affect that. The other part is said to have been settled after the marriage. With respect to that part, the question is, whether this settlement is to be considered fraudulent against the creditors. It is said, as the creditors have not proved, that the testator was indebted at the date of the settlement, that is not now to be made a subject of inquiry. The case of *Lush* v. *Wilkinson*, *(a)* cited in support of that proposition, does not resemble this case. In that cause the bill was filed for the express purpose of affecting the settlement, upon the ground, that the settler was insolvent at the time it was made. There was no evidence in support of the bill; and there was evidence to the contrary, produced by the widow. The only reason for surprise therefore is, that Lord *Alvanley* did not absolutely dismiss the bill, instead of giving liberty to file another. But in this instance the creditor, not apprised of the settlement, filed the bill, to affect all the devisees; and this settlement came out in the answer, which led to inquiry. Though there has been much controversy, and a variety of decision, upon the question, whether such a settlement is fraudulent as to any creditors, except such as were creditors at the time, I am disposed to follow the latest decision, that of *Montague* v. *Lord Sandwich*; which is, [156] that the settlement is fraudulent only as against such creditors as were creditors at the time. *(a)*

The next claim is that of the copyhold estates, not surrendered to the use of the will. It is contended, that though the copyholds are not surrendered to the use of the will, the want of a surrender is to be supplied in the case of creditors; provided there are general words, sufficient to extend to copyhold estate. The words of this will are sufficiently general to comprehend all the real estate: "messuages, lands, tenements, and hereditaments." It is contended by the Plaintiff in the supplemental bill, that the case of creditors is distinct from that of a widow, or younger children; that though in favour of a widow or younger children, the Court will not supply the want of a surrender, unless copyhold estate is expressly mentioned, it is

(a) *Ante*, vol. v. 384.

(a) p. 156. Though the settlement can be affected as fraudulent only as against creditors at the time it is made, the consequence if it can be so affected, is, that the subject is thrown into assets; and all subsequent creditors are let in. This was clearly held by Lord *Rosslyn* in *Montague* v. *Lord Sandwich*, {*ante*, vol. v. p. 386, *note*.} See also *Walker* v. *Burrow*, 1 *Ves.* 93.

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otherwise in the case of creditors; that the distinction has been settled by different decisions; that, though in *Challis* v. *Casborn (b)* The Lord *Chancellor* thought, the Court had never gone so far as was then required, viz. to hold, that the question, whether the want of a surrender could be supplied, depended upon the point, whether the estate was wanted for debts, yet in *Drake* v. *Robinson (c)* Lord *Macclesfield* expressly decided, that, if it is wanted for debts, and there is a general devise of lands for payment of debts, [157] the devisor shall be intended to mean to include his copyhold estates. In *Haslewood* v *Pope (a)* Lord *Talbot* recognizes that doctrine; and the case of *Mallabar* v. *Mallabar, (b)* also decided by Lord *Talbot*, seems to have proceeded upon it; whether in that case the question was made, where the unsurrendered copyholds were wanted for debts, or not; and the fact, that they were not wanted, being admitted, the original bill was upon that ground dismissed. That carries with it an implication, that if they had been wanted for debts, they must have been applied. There is also a case, *Lindopp* v. *Eborall*, (c) in which Lord *Thurlow* appears to take it for granted, that this is the established doctrine. It must now therefore be considered as settled, that, if it is necessary for debts, the want of a surrender is to be supplied; though copyhold estates are not expressly mentioned.

But this question does not rest entirely upon that general doctrine: for there is in this case particular evidence of the testator's intention to pass his copyhold estates; for after the general description of all his messuages, lands, tenements, and hereditaments, except the estates, afterwards given to his wife, he makes a disposition of all other his freehold, copyhold, and customary, messuages, lands, &c. It is true, that is a disposition, which cannot have any operation. The testator having already disposed of all his lands, there could not be any other lands, undisposed of; as he had no copyhold estate in *London*, upon which that disposition could operate. But it shows his apprehension, that copyhold, as well as freehold, estates, were the subject of his devise. He understood himself to have been already [158] disposing of copyhold estate. Therefore, if necessary, his intention to dispose of copyhold estate might be resorted to, and would be sufficiently apparent. But for the reasons I have given it is not necessary.

A question is then made by the customary heir, whether she is to account for the rents and profits. It is said, the Court only supplies the want of a surrender, without directing an account. Upon principle that cannot be so; for from

(b) *Pre. Ch.* 407. 1 *Eq. Ca. Ab.* 124. *Gilb.* 96. (c) 1 *P. Wms.* 443.
(a) 3 *P. Wms.* 322. (b) p. 157. *For.* 78.
(c) p. 157. 3 *Bro. C. C.* 188.

the moment the copyhold estates are held to pass, the customary heir is a mere trustee from the beginning for the person, to whom the copyhold estates are given. The Court must therefore decree, that the whole estate belongs to the person, to whom it is given, except so far as by its particular rules it refuses to carry the account back farther than a given period; though the right to the estate is perfectly clear. (a) In *Cook* v. *Arnham* (b) an account was decreed only from the date of the bill; upon the ground, that the younger son was guilty of great *laches* in not having asserted his claim for 14 years. But it is difficult to apply that doctrine to the case of creditors; who have no specific right or interest in the estate; but have only a right to have their debts paid, and the estate applied, so far as is necessary for that purpose. These creditors might not know, until the account was taken, that it was necessary to make any claim to these copyhold estates; and it was uncertain whether, even allowing them to pass, they were to be applied, until the freehold estates should have been exhausted. *Laches*, therefore, is not to be imputed to them, as to a specific devisee, in not having sooner asserted their [159] claim. The claim is made, when they find it necessary for the satisfaction of their demand to make that claim. As to the objection, that this was the case of an infant during a considerable part of the time, that makes no difference; where the devise is of an estate to be sold for payment of debts. In that case an infant is as an adult. In this instance, by construction the copyhold estates are devised. They did not descend upon the infant; supposing it true, as I do not conceive it is, that the rents of an estate, descended upon an infant, could not be applied.

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These are all the questions in this case; and, these points being disposed of, the directions to be given are much of course.

(a) As to the limitation of accounts, see the references, *ante*, vol. vi. 213, note (a): *Pettiward* v. *Prescott*, *ante*, vol. vii. 541.

(b) 3 *P. Will.* 283. *Ante*, 35.

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February 20.

HARDING v. HARDING.

Order to take the answer of Defendants, out of the jurisdiction, without oath and signature. (1)

THE object of this bill was to obtain the sale of an estate, and a distribution of the money according to the rights of the parties. A motion was made, that the answers of two of the Defendants, who were out of the jurisdiction, should be taken without oath, and put in without signature, upon an affidavit by their father, that he has authority to act for his sons.

The Solicitor-General, in support of the Motion, cited the late cases of Sir *Henry Gwillim* (a) and *Bayley* v. *De Walkiers*. (b)

[160] *The Lord* CHANCELLOR, observing, that the object was reasonable, and the cases cited precisely in point, made the order.

(a) *Ante*, vol vi. 285 (b) *Ante*, vol x 441

(1) *Dumond, Adm* v *Magee et al.* 2 Johns. Cha. Rep. 240 ;

CASES

IN

CHANCERY, &c.

THE SITTINGS AFTER HILARY TERM.

46 *Geo.* 3. 1806.

BIDDULPH v. BIDDULPH. (1)

ROLLS.
Feb. 18.

Money, under a direction to be laid out in land, considered as real estate under a general disposition by the will of a person, entitled to it absolutely in either shape, of "the "money and "land," in the absence of intention: the word money being answered by another fund, of stock.

JOHN TOURNAY by his will and codicil, dated in 1732 and 1735, after devising all his real estate to *Robert* and *Francis Biddulph*, and their heirs, to the use of several persons, and their issue male in strict settlement, with the ultimate remainder in fee to *Michael Biddulph*, gave all his jewels, furniture, plate, pictures, goods, and other effects, therein mentioned, to *Robert* and *Frances Biddulph*, and the executors of the survivor, upon trust as to the plate, furniture, and other the personal estate therein mentioned, to permit the respective persons named, and their issue male, to whom he had devised his real estate, to have the use of the said jewels, plate, furniture, and other personal estate, before mentioned, during the respective times, and according to the interests they should have in the real estate; and, after some legacies, he gave and bequeathed the rest, residue, and remainder, of all and every his goods and chattels, and ready money, stock in the public funds, and government securities, and all other his estate of what nature or kind soever not before given or bequeathed, his just debts

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(1) Cited 3 Wheaton, 570.

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and funeral charges being first thereout paid and defrayed, to *Robert* and *Francis Biddulph*, and the survivor, his executor, &c. upon trust, with the approbation of his executor to lay out the same in the purchase of freehold lands of inheritance for the maintenance of his mansion-house at *Esher*; and to settle and assure the same to and for the several purposes, and to the use of the respective persons, to whom his real estate was limited and directed, and according to the several and respective interests, that the said persons respectively had by his will in the said real estates, and subject to the several Annuities by his will granted, and in such manner as his freehold estate was thereinbefore settled; and until a purchase could be made, that the interest, increase or produce, of the residue of his personal estate should be paid to the several persons respectively, as the rents and profits of his real estate by his will were directed to be paid.

The testator died in 1736. None of the tenants for life had any issue male, who lived to take the real estates. *Catherine Tomkyns*, the surviving tenant for life, died in 1781 *Michael Biddulph* by his will, dated in 1749, and duly executed to pass real estate, declared, that as to the reversionary interest which he had in the estate of *John Tournay*, he made no disposition; being desirous, in case the contingencies happen, upon which the same is limited to him and his heirs, that the same may descend to his heir at law. He died in 1759 without issue, leaving his eldest brother *Robert Biddulph*, his heir at law.

Robert Biddulph died in 1772, leaving three sons: *Michael*, *Benjamin*, and *Francis*. *Robert Biddulph* by his will, dated the 27th of *January* 1768, duly executed to pass freehold estate, devised and bequeathed, as follows:

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"I *Robert Biddulph* do by this my will give to my son "*Michael Biddulph*, all my lands purchased of the late *Mr.* "*Hall*," &c.: "all my money, securities for money, and ar- "rears of rent, to my son *Francis Biddulph* to pay my debts, "funeral expenses, and legacies; and do make him my sole "executor and residuary legatee; and for the money and "lands, which *Mrs. Catherine Tomkyns* has the profits of "during her life, that I give to my son *Francis Biddulph*, "paying to my son *Michael Biddulph* one-third of the value "of it, if living at her death: if not, to his younger chil- "dren."

In 1764 the testator *Tournay*'s plate and other articles of personal estate, at *Esher*, given by his will as heir-looms, were sold; and the produce was laid out in 820*l.* 12*s.* 6*d.* 3 *per cent.* Annuities in trust for the persons entitled to the real estate. The residue of the personal estate of *Tournay* was laid out in 3148*l.* 0*s.* 1*d.* in the name of *Michael Biddulph*; who died in 1759.

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The bill was filed by one of the next of kin of *Francis Biddulph*, being the only child of his deceased brother *Benjamin*, against *Michael*, the eldest brother, heir at law, and other next of kin, of *Francis Biddulph*; praying a declaration, that the 3148*l.* 0*s.* 1*d.* *South Sea* Annuities passed by the will of *Robert Biddulph* as money, and not as real estate: and that *Francis Biddulph* was at his death entitled to two third parts; and was trustee of the remaining third for his brother *Michael*, and that a transfer may be made accordingly.

The Defendant, the heir at law, submitted, that the right of *Robert Biddulph* to the *South Sea* Annuities subsisted in him as real estate; and passed under his will to his sons *Francis* and *Michael* as real estate; and at the death of *Francis* the two parts which belonged to him, were of the nature of real estate, and as such descended to his brother and heir *Michael*. [164]

Mr. Hart, for the Plaintiff, and The Solicitor-General, for a Defendant in the same Interest, contended, upon the question, whether this fund was taken as real or personal estate, that the intention of the testator *Robert Biddulph* was to pass it as money; treating it as money; and treating as land the property existing in that shape. They observed, that the rule, in *Rose* v. *Bartlet*, (*a*) though it had been a little shaken, was restored to its original strictness, in the late case of *Thompson* v. *Lawley*; (*b*) and according to that rule, as there was property actually answering the description of land, that only could pass to *Francis Biddulph* as real estate; and the rest must pass to him as personal property. There is no equity between representatives to change the nature of the fund. The court will treat it, as they find it left by the owner.

Mr. Richards, and Mr. Wyatt, for the Defendant, the Heir, contended, that this property, originally personal, being directed to be laid out in land, given by the same words to the same persons, and charged in the same manner as the real estate, must be considered as land; until an alteration by a person entitled can be shown by a direct act of severance from the real uses, or presumed. The word "money," in the will of *Robert Biddulph*, is satisfied by the other fund of stock.

The MASTER *of the* ROLLS.—In this case *Robert Biddulph* was the absolute owner of the fund; whether it was taken as money, or as land. He might have disposed of it, as either money, or land: but in the absence of all intention on his part it is to be taken as that, which this Court consi- [165]

(*a*) *Cro. Ch.* 993.

(*b*) 2 *Bos.* & *Pul.* 303. *ante*, vol. v. 476. *Watkins* v. *Lea*, *ante*, vol. vi. 633.

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ders it; with the character this Court impresses upon it. The question is, whether from the passage in this will the intention to give this fund as money is to be implied; for no act is pretended. If he had died intestate, this fund would have gone to his heir; and the other fund would have gone to his personal representative. The latter, was originally given as specific articles, heir looms: but the instant there was a tenant in fee or in tail of the estate, he became the absolute owner of these chattels; and, being sold, and the money laid out in stock, the word "money" was properly applicable to them. There is a marked distinction therefore between the two funds. One would have gone to the heir; the other to the personal representative. The will of *Robert Biddulph* disposes in terms applicable to both; having the words "money and lands." The will does not indicate any clear intention in the testator to treat that as money, which according to the construction of this Court was to be considered as land. There might be some question, if there was nothing to answer the word "money" except this fund. The argument upon the case of *Rose* v. *Bartlet* (*a*) and others, that have been referred to, would then apply. The Court must, if there is nothing else to pass by that denomination, suppose that fund to be intended; but will not apply the word improperly, if there is any
[166] subject, to which it can properly apply. In that case it is not to be used in any other sense than that, in which this Court uses it. Something is necessary to show, that the party himself considered that, which this Court calls land, as being money. In this instance there is an absolute absence of intention; as there are funds which answer either description; and, being indifferent, the Court of necessity follows its own construction: the testator having given no indication that he meant to use the word otherwise than in its vulgar sense. (*a*)

(*a*) *Cro. Car.* 293.

(*a*) p. 166. This decision follows Lord *Eldon's* opinion, *ante*, vol. vii. 235, in *Wheldale* v. *Partridge*; in opposition to that of Lord *Rosslyn* in *Walker* v. *Denne*, *ante*, vol. ii. 170, that there is no equity between representatives to change the nature of the property; but it must go, as it happens to be found. Lord *Eldon* holding, that, to remove the impression of real uses, the money must come to the possession of the party, from whom the representatives claim: or, if it is in the hands of a third person, some act must be done, denoting a change of intention.

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ROLLS.
Feb. 18, 19.

PURCELL *v.* M'NAMARA.

Order to refer back to the Master an examination, under the direction in a decree for examination of the parties, to see whether it was sufficient.

Exception to the report, and in the general terms, that the Master had reported the examination sufficient, whereas he ought to have reported it insufficient, is irregular; but not to be encouraged; and therefore, being overruled, costs beyond the deposit were given.

UNDER the decree in this cause, directing inquiries to be made, and accounts to be taken, with the usual direction, that all parties shall be examined upon oath, the Defendant exhibited interrogatories for the examination of the Plaintiff, as to sums of money * alleged to have been advanced by him upon her account. The interrogatories were settled by the Master; and an examination was put in; with which the Master was satisfied. An order was then obtained; referring the examination back to the Master, to look into it; and see, whether it was sufficient; and the Master under that order reporting, that it was sufficient, an exception was taken: stating generally, that the Master had reported the examination to be sufficient; whereas he ought to have reported it insufficient. The exception coming on for argument, an objection was taken for the Plaintiff, that such an exception was irregular.

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The Solicitor-General, and Mr. Hart, for the Plaintiff.—This exception does not state in what respect the examination is insufficient; which one of these interrogatories, which, though only four in number, are very long, is not answered. Therefore, if regular, the mode of bringing the subject before the Court makes it impossible for the Plaintiff to know, in what respect the examination is insufficient. In the instance of an answer particular exceptions are taken; pointing out the particular interrogatories, which, it is conceived, are not answered.

But the whole proceeding is irregular, and not warranted by practice. There is no instance of an exception to a report of this nature. The Master has settled, what the interrogation shall be; to what points he wishes to have the examination of the party; and he is satisfied; which is the object of the decree. How can the Court review such a proceeding? If there can be an appeal from the Master's decision, which is very difficult to conceive, it must be upon some special application, that the Master may require some further examination. Upon an exception in this way the Court cannot possibly know, upon what the Master has proceeded. Such a proceeding as this is the source of infinite delay and inconvenience. The effect is a new bill, in the shape of interrogatories, for a new discovery of every transaction; after all the usual process has been exhausted.

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Mr. Fonblanque, Mr. Thomson, and Mr. W. Agar, in support of the Exception.—The Master's report is in very few instances conclusive. The object of this direction, in every decree for an account, for the examination of the parties, is to prevent another suit: the parties having leave to

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do that by interrogatories, which must otherwise be done by suit The examination of the party is in this case of extreme importance, and what other course is there of proceeding by way of appeal from the Master's judgment? This point is expressly decided by Lord *Thurlow*, upon consultation with Sir *Thomas Sewell* Master of the Rolls, in *Stanyford* v *Tudor*, (*a*) and there is a late instance of such an exception in the case of *Lucas* v *Temple* In that case the Defendant *Philips* had put in an examination, which was reported insufficient He was committed for a contempt in not putting in his examination, and, being in contempt, and for the purpose of clearing his contempt, he put in an examination, which was considered sufficient, and upon that the exception, in these general terms, was taken and allowed The Court of *Exchequer* in the common case of an examination put in by the Defendant to interrogatories, if the Plaintiff is dissatisfied, look into the point, whether the examination is sufficient or not, upon exception.

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Upon the other objection, it may be convenient to point out the specific interrogatories. but that is not the practice In the case of an answer, reported insufficient in particular instances, it is not necessary to specify all So upon a reference for scandal or impertinence the exception is general: *Mackworth* v. *Briggs* (*a*)

The Solicitor-General, in Reply —There is no objection from the want of an appeal from the Master's judgment, for in the several instances of reports, to which exceptions cannot be taken, the judgment of the Court may certainly be obtained upon them in some other way; by motion or petition, (*b*) bringing the particular points, upon which the Master's judgment is complained of, specifically before the Court The question upon such an application is, not only, whether the interrogatory is sufficiently answered, but also, whether it is material or not. The present practice is in opposition to the case in *Atkyns*. Upon exceptions to an answer the Plaintiff must point out the particulars, in which the answer is insufficient, and is then considered as having waived every other objection of insufficiency. But, after this point is decided, another exception may be taken in the the same general way, and the subject may be brought repeatedly before the Court: a most convenient instrument of delay.

Mr. Richards (being applied to by *the* MASTER *of the* ROLLS) said, his impression was, that this is the proper mode of bringing the point before the Court.

(*a*) 2 *Duck* 548
(*a*) p 169 2 *Atk* 181 (*b*) *Lucas* v *Temple*, *ante*, vol. ix 299.

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The MASTER *of the* ROLLS.—The case of *Lucas* v. *Temple* is an instance of an exception of this sort. As to orders of reference of this description, they are, whether very frequent or not, the established practice; there are many instances of referring examinations to the Master, to look into them; and see whether they are sufficient. That, I think, must be for the purpose of bringing the question before the Court; and in the case of *Lucas* v. *Temple*, Lord *Alvanley* allowed an exception as general as this; and made an order, referring it back to the Master to review his report; and that the Plaintiff and his wife should be at liberty to exhibit further interrogatories for the examination of *Philips*; and that *Philips* also should be at liberty to exhibit interrogatories to examine any of the parties. This decides the question in point of authority. It would not become me upon any supposed inconvenience, to depart from a practice established by some of the most able of my predecessors. That this practice of excepting to reports with regard to the sufficiency or insufficiency of examinations, and excepting in these very general terms, may be attended with considerable inconvenience, is obvious. All the observation I shall found upon that at present is, that the Court ought to look at the examination, brought before it in that way; to see, whether there is a substantial defect: not with a critical eye; holding insufficient every examination, that is not framed with the strict accuracy of special pleading. The more convenient mode would be that, which Lord *Thurlow* mentions, with reference to an exception for costs. (*a*) An exception to the report does not lie for an improper allowance for costs. However the Master might perhaps in a particular instance deviate so far from the established rules as to costs, that it would be hard to exclude the party from bringing it before the Court; and Lord *Thurlow* said, the proper course is a petition, pointing out the particular grievance, and praying leave to except. In that mode the Court would exercise its judgment; and, if leave was granted, it would have the effect of confining the exception to the particular *items*. But in this general mode I must decide against the Master generally, without the possibility that he should know, what is the ground. It may go back to him to re-examine the party; and again there may be an exception to the examination, as insufficient; and it would be difficult to say, at what period it is possible to bring the matter to such a distinct understanding between the Court and the Master, that it will be possible to understand the precise ground or the distinct variance.

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But, as this is in practice permitted, all I have to consider is, whether there is any substantial defect. If any reli-

(*a*) *Pitt* v. *Mackreth*, 3 *Bro. C. C.* 321 See *Lucas* v. *Temple*, *ante*, vol. ix. 299.

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ance is to be placed upon the case of *Stanyford* v. *Tudor*, (a) this is the only opportunity the Court has of considering the materiality. If that be so, that the materiality ought to be taken into consideration, there is another inconvenience, to which the practice necessarily opens; that you must to a considerable degree hear the cause: at least I must hear the decree; which it is difficult to do without hearing the subject, to which it referred.

The first of these interrogatories is substantially answered, in the only way in which a party in the situation of this [172] Plaintiff could be expected to answer. The objection is, that she does not distinctly say what part of a journey was defrayed at their joint expense. That is rather a question as to a conclusion of law; for she states, that no arrangement took place upon it. Then she can only state the fact; and she says the expense was defrayed by each advancing money, as they had it. It is for the Master to say, whether that is at their joint expense. What more can she state than the fact? It is not for her to say it was at their joint expense. That therefore is sufficiently answered. As to the second interrogatory, I do not see what bearing the question has upon the account; which was referred to the Master. The decree has already decided, what deeds and accounts ought to be set aside, and upon what grounds. The subject of this question might be fit for The Lord *Chancellor's* consideration; when considering, whether a deed under such circumstances should be set aside; but the Master could not derive any assistance from it. Then there is no substantial defect in the answer of the Plaintiff, that she never heard or was informed of any such opinions being taken, and does not believe she ever saw any such. Upon the third interrogatory the objection is, that the Plaintiff does not state what admissions she made, except such as she might have made at the time, and by the signing the several deeds, &c. The decree has determined that all her admissions, in the most formal manner, by signing deeds, and settling accounts, are to go for nothing. Then can it be material, what parol admissions she made at the same moment, and accompanying the written admissions? The Master could not pay attention to them. The fourth interrogatory, going to the payment, is material and relevant. But, upon the whole answer taken together, it appears impossible to get from her, by any number of examinations, [173] more than a mere verbal variation from her former answer; as she cannot give any better account than she has given; for she says, she knows nothing herself; but from certain accounts kept she took upon her to make out a schedule; but could not from any knowledge of her own state

(a) 2 *Dick.* 548

any one advance made to her; and, as to the schedule, she cannot to the best of her remembrance, information, or belief, say, whether the sums stated by the Defendant, were advanced, or not, save as in the schedule set forth; and that is not from her own knowledge, but from certain accounts. The only effect of sending this back could be, to get the Plaintiff to vary a little the phrase of her answer; but, unless the answer is false, it is impossible for the Defendant to obtain any further information, or admission, by sending it back. My opinion is therefore, that this examination is substantially sufficient.

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The exceptions therefore were over-ruled.

For the Plaintiff an application was made for costs beyond the deposit, upon the discretion of the Court, under the general rule (*a*) established by Lord *Rosslyn* and Lord *Alvanley*.

For the Defendant it was insisted, that the rule applied to a re-hearing of exceptions.

The MASTER *of the* ROLLS said, that, if ever costs beyond the deposit are given, this is a case that calls for them; as the practice of taking exceptions to these reports is most inconvenient, and to be discouraged: if, therefore, it has been done, it should be done in this instance.

The Register producing two late instances, in which upon exceptions disallowed costs beyond the deposit were given, the order was made accordingly. [174]

(*a*) 4 *Bro. C. C.* 345

WOOLLANDS *v.* CROWCHER.

ROLLS. *Feb.* 19. 21.

Consent of a married woman, taken in Court, under a bill by her and her husband for execution of a contract for sale of her reversionary contingent interest in stock. Consent not taken until the subject is ascertained.

JAMES HIND by his will bequeathed to *Polly Vidger* all the remainder and residue of all his estate wheresoever and whatsoever, and of what nature and kind soever, for the term of her natural life; and at her decease bequeathed all the residue, &c. in the same terms, to *Elizabeth Keightley* and two other persons for the term of their natural lives, in equal shares; and at the decease of either of them to be equally divided between all their children.

This residuary estate consisted, besides some real estate, of leasehold houses, of 7000*l.*, 2000*l.*, and 1225*l.*, stock. *Elizabeth Keightley* married *Woollands*; and they contracted to sell her reversionary interest in those three funds of

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stock for 180*l.* to the Defendant; who objected to complete the purchase without the consent of the wife, expressed in Court, upon which the bill was filed for a specific performance. The bill, as originally framed, extended also to the interest in the produce of the houses, when they should be sold: but in the interval between the hearing of the cause and the judgment the bill was amended by striking out all the Plaintiffs, except *Woollands* and his wife; and all that was stated and prayed as to the houses and real property; confining the suit to the stock.

[175] *The* MASTER *of the* ROLLS expressed doubt, whether this was a proper case for taking the consent.

Mr. Heald, for the Plaintiff.— In *Hewitt* v. *Crowcher* (*a*) a decree was made by Lord *Alvanley* under similar circumstances upon the same will. That decree states, that *Mary Hewett*, the Plaintiff, being present in Court, and being examined, and desiring that the contract shall be carried into execution, it was decreed accordingly These Plaintiffs desire the same decree.

Another case, *Gregg* v. *Crowcher*, had an ingredient that does not occur in this instance. The children, only a son and a daughter, were entitled to a reversionary, contingent, interest in the property, depending upon the life of the widow. The son, going abroad in the army, agreed to release his interest to his sister and her husband, upon receiving the absolute interest in 1700*l.* The share, remaining to the daughter, was 3700*l.*; and she and her husband in 1800 contracted for the sale to *Crowcher* of 1700*l.*, part of that fund, subject to the life estate of her mother under the will. So far that case resembles this. But it appears in the decree, that between the purchase in 1800, and the decree in 1801, the husband and wife made a settlement upon her of the remaining part of the fund of 3700*l.* Then they came to the Court, praying a specific performance of the agreement; and, that the 1700*l.* might be assigned to *Crowcher*, subject to the life estate. The decree directs a specific performance: the Plaintiff, the wife, being present in Court, and examined, and consenting and desiring, that
[176] the 1700*l.* 3 *per cent.* consolidated Bank Annuities, to which she is absolutely entitled upon the death of her mother, may be performed.

In that case *The Master of the Rolls* thought the bargain not very beneficial for the wife. The subject was all her property; and *The Master of the Rolls* took considerable pains to inform her as to the act she was doing: but, as she persisted, the decree was made. The former case is a precise authority for the decree now prayed.

(*a*) At the Rolls, 20th *Feb.* 1800.

1803.

WOOLLAMS v. CROWCHER.

The MASTER *of the* ROLLS.—It is directly in point. Do you find any other case in the books?

For the Plaintiffs.—There is no other precedent in point. But in the modern cases upon this doctrine, *Like* v. *Beresford*, (*a*) and *Franco* v. *Franco*, (*b*) there is nothing against this mode of proceeding. A purchase of this nature does not bind the wife, unless she comes into Court; and consents; as, if the subject is real estate, her consent is taken by fine. If this mode cannot be pursued, she might at a future period set aside the contract. The interest of the Plaintiffs is in this instance merely contingent; and the bargain beneficial for them. The wife cannot prevent the sale by her husband; but she has an interest to enable him to get as much as he can. Her consent will enable him to get more.

The MASTER *of the* ROLLS.—In the first of the two cases before Lord *Alvanley*, is there any provision as to the price?

For the Plaintiffs.—There is no such provision. It does [177] not appear, whether it was to be paid into Court. The inference is, that the husband is to have it absolutely. But the decree does not express to whom the money was to be paid. The fact is, that it was paid to the husband.

Mr. Richards (*Amicus Curiæ*) said, there never was an instance of such a decree; directing a transfer of a reversionary interest in stock.

The MASTER *of the* ROLLS.—As to the other case, that, I suppose, was considered within the authorities, that a settlement being made of part of the fund, the husband is entitled to the rest. My doubt is, that this is not the common case for taking the examination. The ordinary occasion for that is, where the husband applies to have paid to him money, that belongs presently and immediately to his wife. Her equity is, not to prevent his receipt of it, (for it belongs to him,) but to have a settlement; and the Court requires her consent to the payment to him without a settlement. But in this instance the object is not to bar her equity to have a settlement, but to bar her right to survivorship; for upon his death it belongs to her entirely. She is giving up, not her equity only, but her entire right by survivorship. That is not the case, in which the Court takes her consent. If the husband has a right to convey, let him exercise his right. But why this Court should join, and aid him for that purpose, I do not know. In *Richards* v. *Chambers* (*a*) I gave my reasons for holding, that the case of a fine does not apply by analogy. With regard [178] to the prayer as to the produce of the houses, when sold, the

(*a*) *Ante*, vol. iii. 506. (*b*) *Ante*, vol. iv. 555.
(*a*) p. 177. *Ante* vol. x. 580. See page 587.

1806. Court never takes the consent, until the subject is ascertained; according to Lord *Eldon's* decision in *Sperling* v. *Rochfort*. (*a*)

WOODLANDS v. CROWDER.

Feb. 21. *The* MASTER *of the* ROLLS.—I shall take the wife's consent *de bene esse;* as it was taken in the latter of the two cases before Lord *Alvanley*, to which you have referred me. The only question is, whether the Court will by anticipation, taking the wife's consent, preclude the question, that may arise upon it. The effect of an assignment upon reversionary property has been doubted. In *Saddington* v. *Kinsman* (*b*) it was argued strenuously by *Mr. Madocks*, that the Court would not anticipate as to future property. In other cases it has been said, they will: and those two cases before Lord *Alvanley* are so. The latter of those decrees is precisely correct; decreeing that fund of stock to the Plaintiffs; and then taking the wife's consent for the amount of the stock sold, to which she was absolutely entitled upon the death of her mother.

The Plaintiff's consent was accordingly taken.

(*a*) *Ante*, vol. viii. 164. (*b*) 1 *Bro. C. C.* 44.

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VERE *v.* LOVEDEN.

ROLLS. *Feb.* 21. 25.

Whether an agreement for lease, with usual covenants, includes a covenant against assigning or underletting without license, *Query*.

In this instance, upon the particular construction of the agreement, for the lease of a farm, the words "such other clauses as are usual in such cases" had not that effect.

BY agreement between the Plaintiff and Defendant, dated the 2d of *February* 1802, the Defendant agreed to demise to the Plaintiff, his heirs and assigns, for his own life and two others, a farm in the county of *Pembroke*, in as full and ample a manner as *Stephen Morris*, and his undertenants lately held the same, at the yearly rent of 121*l.* 10*s.*; to be paid half-yearly, &c. Then followed provisions for reserving to the Defendant the accustomed heriots, duties, and services, timber, mines, &c., with liberty to enter and cut and carry away the trees, and to open and work mines, &c. in the usual manner. The agreement then stated, that it was also agreed, that in the said lease shall be contained covenants by and on the part of the tenant, his heirs, executors, administrators, and assigns, for payment of the rents,

taxes, &c. for keeping the premises and all the walls, gates, &c. in good repair, during the lease, and so leaving them at the determination thereof; also, in the usual manner, for the landlord to enter and see the state of the premises, as to repairs. The agreement then concluded thus:

1806. VERE v. LOVEDAY.

"And lastly it is agreed that the lease shall take effect "in possession from making thereof and determinable on "the lives aforesaid and therein shall be contained a clause "of re-entry by the landlord for non-payment of the rents "duties and services to be therein reserved or for breach "of any of the covenants on the tenant's part therein to be "contained and such other clauses as are usual in such "cases."

The Plaintiff having been in possession under the agreement, and laid out money, a dispute arose; and the Defendant insisting, that the lease to be granted should contain a covenant by the tenant against assigning and underletting without license; and refusing to grant a lease without that covenant, the bill was filed; praying a specific performance of the agreement. [180]

The Defendant by his answer insisted, that the covenant against assigning, or underletting, without license is an usual and proper covenant, and according to the custom of the County, where the premises lie; and stated, that the last tenant, who held the premises by lease, was *John Roach*; whose lease, dated in 1762, contained a covenant against assigning, transferring, or setting over such indentures of lease, or any part of the premises.

The Solicitor-General, and Mr. Roupell, for the Plaintiff.—The tenant is entitled to a declaration similar to that in *Henderson* v. *Hay*, (*a*) that the lessor has not a right to such a covenant. Even in such a lease as that, Lord *Thurlow* thought it, not a usual covenant, but a special covenant, for which there must be a stipulation. Some cases have since occurred, which in some degree shake that authority: *Folkingham* v. *Croft*, (*b*) and *Morgan* v. *Slaughter*; (*c*) in which cases such a covenant was held to be reasonable and usual. But in both these instances the subject was a public house; and the argument was, the great importance to the landlord to know who is to come in: as, if the tenant's conduct is improper, the license will be taken away, and the property ruined. But this is a farm lease for lives, a freehold interest. All the covenants, intended to be comprised in it, are enumerated, and this claim is made merely under the words, "Such other clauses as are usual "in such cases." That cannot mean other covenants than those expressly enumerated. The covenant now required is a most important covenant, not usual in a lease of [181]

(*a*) 3 *Bro. C. C.* 632. (*b*) 3 *Anstr.* 700. (*c*) 1 *Esp. N. Pri. Cas.* 8.

1806.

VINE v. LOVELL.

this kind; a covenant, to which consent cannot be presumed. This cannot be considered an agreement for usual covenants: nor, is this a usual covenant in a farm lease. In *Boardman* v. *Mostyn*, (a) it is true, Lord *Eldon* says, (b) the point as to this covenant must be the subject of inquiry as to the usual and customary covenants of the neighbourhood: but in that case, besides many other circumstances, the special agreement was for a lease with the usual and customary covenants of the neighbourhood; which was a proper subject of inquiry.

Mr. Fonblanque, and Mr. Bell, for the Defendant.—The Defendant meant to reserve all the advantages as lessor, which the usage of the country would give him. Lord *Thurlow's* judgment in *Henderson* v. *Hay* (c) rests upon the distinction between usual and common covenants. In the management of a farm, considerable skill and other qualities are essential. What may be the effect of an assignment to a mere beggar, or to a person wholly incapable of managing the farm? As to the word "clause," the meaning of it, as used in the preceding passage, must be
[182] in the nature of a covenant; *viz.* a clause of re-entry for non-payment of rent. In *Jones* v. *Jones* (a) the object of the bill was the specific performance of an agreement to grant a lease for three lives, containing all proper covenants. The defence was, that the party had, by under-letting and other acts, committed a forfeiture. A reference was directed to settle a lease according to the agreement; but without prejudice to the question, whether the Plaintiff was entitled to a specific performance; and the injunction was continued. Upon that case, and *Boardman* v. *Mostyn*, (b) it is premature to determine this question now; and it would have been improper to have gone into evidence in the first instance. The statement in the answer, that a former lease had such a clause, is a sufficient ground for an inquiry.

The Solicitor-General, in Reply.—Lord *Thurlow* could not have taken a distinction between usual and common covenants. In this case there is no reference to any usage of the country, or neighbourhood, as in *Boardman* v. *Mostyn*. (c) This stipulation is for clauses usual in such cases. What can be the evidence of that? The clause, giving power of distress, is a usual clause, though not very necessary. Clauses of that description are intended. In *Jones* v. *Jones* several other covenants were insisted on by the Defendant; and therefore an inquiry was necessary.

(a) *Ante*, vol. vi. 467.
(b) *Ante*, vol. vi. 471.
(c) 3 *Bro. C. C.* 632.
(a) p. 182. The next case.
(b) p. 182. *Ante*, vol. vi. 467.
(c) p. 182. *Ante*, vol. vi. 46.

1806.

VANE v. LOVEDEN. Feb. 25.

The MASTER *of the* ROLLS.—It seems to me, that this case may be determined upon its own ground, without any reference to the general * question, which is the subject of those conflicting authorities that have been cited. In the case of *Jones* v. *Jones* (*a*) I expressed the inclination of my opinion upon that general question: but it is not necessary to enter into it upon this occasion. This is not a mere agreement for a lease, with proper and usual covenants: but it is an agreement, which contains, in great detail, the terms which the lease is to contain; and it seems to me to be drawn with great method, and apparent skill. It is to be observed, 1st, that the lease is to be granted to the Plaintiff, "his heirs and assigns," for three lives I do not say, that necessarily excludes a covenant against assigning without licence: but I should require to be clearly satisfied, that the intention was to introduce a covenant, to have the effect of preventing any assignment without license of the lessor. [* 183]

The agreement proceeds then to state the premises, then the rent; then the exception and reservation out of the lease; then the covenants, which the lease is to contain; declaring, that it is agreed, that in the said lease shall be contained covenants by and on the part of the tenant, his heirs, executors, administrators, and "assigns." It then goes on to specify all the covenants, usually introduced into leases. When that part is terminated, it then goes on to other matters, declaring, that lastly it is agreed, that the lease shall take effect in possession from making thereof, determinable on the lives aforesaid; and then follows the passage, upon which the question arises: "and therein "shall be contained a clause of re-entry by the landlord for "non-payment of the rents duties and services to be "therein reserved or for breach of any of the covenants "on the tenant's part therein to be contained, and such [184] "other clauses as are usual in such cases."

The connexion of these last words is with the clause of re-entry, mentioned immediately before. The construction therefore ought unquestionably to be clauses of the same kind as that, with which those words are connected. The agreement had already provided, what the covenants should be. It then proceeds to state, what the security shall be: re-entry for breach of any of those covenants, and adds, "such other clauses as are usual in such cases." Then, if there be any clause, to give effect to that security, there is a right to such clause. But it cannot be contended, that it was meant here to go back to the subject of the covenants, which they had concluded, and passed from to a new subject; and this is connected naturally with that

(*a*) The next case

1806. new subject; security for the performance of the covenants. It would be a construction against the obvious meaning to say, the parties thought here of such a very material covenant, affecting the whole interest, as to which they were bargaining; *viz.* whether the lease should, or should not, be assignable; and that they conceived, there was no better way of determining that than under this obscure clause.

VAN v. LOFTUS.

This is not within the cases, where the agreement is totally silent as to all the covenants, to be contained in the lease; and expresses only, that it is to contain the usual covenants. There a fair question arises: What are the usual covenants? The case of *Jones* v *Jones* (*a*) does not bear upon this; for there the agreement was only to execute a lease with all proper covenants. None whatsoever were specified. It was clear, if a bill had been filed immediately, a reference, to determine what the lease ought to be, and what the covenants ought to be, would have been of course. But the defence set up was, that, if the lease had been executed, it must have contained certain covenants; and the Defendant specified several covenants, that must have been contained in it according to the agreement; every one of which, it was contended, had been broken. The lease therefore would have been forfeited, if it had been granted at the date of the agreement. Therefore I had either to direct the reference, or, to draw out myself the draft of a lease; in order to see, what covenants it would have contained, and then to apply the evidence, to see, whether any of those covenants had been broken; which I thought was not the business of the Court; but was proper for the Master; and then, the lease being settled, I could apply the evidence, to determine, whether the covenants had been broken; in order to guide my judgment upon the point, whether it was fit, or not, that the agreement should be performed; and I think, that was the proper decision. But some words have crept into the decree, making it apparently inconsistent with itself, and repugnant; that the Master should settle a lease, to be executed, without prejudice to the question, whether the Plaintiff is entitled to a specific performance of the agreement. That undoubtedly was not my intention; which was only, that the Master should prepare such a lease, as was fit according to the agreement; leaving the question open, whether the agreement should or should not be executed. There the parties had not come to any point; for the question, what the lease should contain, was entirely open. Here they have come to a point. There is nothing in difference between them but this single covenant.

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(*a*) The next case.

Therefore, without entering into the consideration, whether the judgment of Lord *Thurlow* was right, or * that of the Court of *Exchequer*, I may in this case do what Lord *Thurlow* did; make a declaration, that this particular covenant, insisted on by the Defendant, ought not to be introduced into the lease. But this decree must be without costs, *(a)*

1806.

VAUX v. LEVESON.

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(a) Jones v. *Jones*, the next case.

JONES v. JONES.

Rolls. 1803. *Dec.* 2.

Whether under an agreement for a lease, containing all proper covenants, a covenant against assigning or underletting should be included, *Query.*

THE bill prayed the specific performance of an agreement, made upon the 19th of *June* 1761, to grant a lease of several houses, at several rents, amounting in the whole to 70*l*, during three lives, containing all proper covenants.

The answer insisted upon the provision, that the lease was to contain all proper covenants; which would according to the usage of the neighbourhood restrain the lessee from committing waste, or letting; and would compel the tenant to keep the premises in good, substantial and tenantable, repair; and would have made a reservation of all timber trees, wood and underwood, coal-mines, &c.: and would have imposed a forfeiture in case of the breach of any of those covenants. The answer further insisted, that the tenant had permitted and committed waste: that the land had been over-cropped, and managed in a very unhusbandlike manner; and the tenant had worked coal and culm; and underlet; and that these acts, according to the usual covenants in leases of lands in the neighbourhood, would have been a forfeiture of the lease; if any had been in existence.

By a further answer to the amended bill the Defendant stated, that, in case a lease had been granted, it would have contained a proper covenant, on the part of the lessee, not to assign or underlet without license of the lessor, his heirs and assigns, and a power for the lessor, his heirs and assigns, to re-enter in case of a breach; and insisted, that by underletting and by other acts and omissions, the tenant would have committed a forfeiture.

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The Defendant went into evidence of the usage of the neighbourhood to insert a covenant against underletting, and of waste committed.

Mr. Richards, and Mr. Leach, for the Plaintiff.—To maintain the right of the lessor to a covenant against assigning or underletting without license a special contract is necessary. From the nature of these premises, consisting

1806 of several distinct premises, they could not be taken without the intention to underlet. The same covenant may be proper and improper, according to the nature of the subject. In the case of a public house a covenant not to assign without license may be very proper: yet such a covenant was rejected by Lord *Thurlow* in *Henderson* v. *Hay*. (*a*) It would be a very improper covenant in the case of a farm with many houses upon it Such a power in a landlord might produce great prejudice to the tenant, if they happened to be upon bad terms

[188] *Mr Alexander, and Mr Bell, for the Defendant.*—Under this agreement for a lease, to contain all proper covenants, the Court would insert a covenant not to assign or underlet without license, as a proper covenant independent of the circumstance, that according to the custom of the country it is a usual covenant The point, that, independent of particular usage, this covenant ought to be inserted in every lease, is settled, contrary to the opinion of Lord *Thurlow*, in *Henderson* v *Hay*, (*a*) by a very clear opinion of Lord *Kenyon* in *Morgan* v *Slaughter*, (*b*) followed by the Court of *Exchequer* in *Tolkingham* v *Croft* (*c*) The stipulation for "proper" covenants must include usual covenants, those which the custom of the country has established as necessary Though these premises consist of several tenements, which cannot be occupied by the Plaintiff personally, it is very reasonable, that he should not put in tenants without license

The Master *of the* Rolls—It is admitted, that this Court will never decree the specific performance of an agreement, if it is clear, that covenants must of necessity be introduced into the instrument to be executed, that the party, resisting the performance, may immediately take advantage of, to deprive the other of all benefit from that instrument. But, it ought to appear clearly, that such will be the case: otherwise the proper, and the safest, course would be to direct the execution, and then allow the other to avail himself, if he can, of any breach of covenant; for that question, whether a covenant has been broken, or not,

[189] if there is any doubt of the fact, is more proper for the determination of a Court of Law and a jury We know, that a covenant may, according to the strict letter, be broken, and yet no recovery can be had in an action upon the covenant Many circumstances enter into the consideration, and may weigh with a jury Many things amount to a waiver of the covenant, or forfeiture, implied or expressed. Wherever therefore there is the least doubt, whether the covenant has

(*a*) 3 *Bro C C* 632
(*a*) p 188 3 *Bro C C* 632 (*b*) 1 *Esp N P. Cas.* 8
(*c*) 3 *Anstr* 700

been broken, or not, the Court ought not to preclude the inquiry by denying the relief that is prayed. 1806.

Admitting it to be clear in this case, that there must be a covenant against underletting, and that the Defendant must recover for a breach of that covenant, it would be nugatory to decree the execution of a lease. There seems however to be some degree of doubt with reference to each of these questions. I own, notwithstanding the decision in the Court of *Exchequer*, and the *Dictum* of Lord *Kenyon*, I think, there is great reason in the opinion of Lord *Thurlow*. The word "proper" admits different senses. There is no covenant almost, which a landlord can propose, that, generally speaking, could be called an improper covenant; for he has a right to let his land upon any terms he may think fit to propose, and there are many covenants, not usual or common, that could not be objected to. But there are many covenants, though proper, that do not naturally flow out of the contract. The contract, *Locatio & Conductio*, does not naturally lead to many covenants, that have now found their way into most leases; and cannot be said to be improper in many of them. But that cannot be the sense with reference to the insertion of this covenant upon the expression in this agreement. It cannot mean these covenants, which would not be unreasonable. It must mean such as are calculated to secure the full effect of the contract.

JONES v. JONES.

In the case *(a)* before Lord *Kenyon* the words were [190] "fair" and "usual," and it was said, this appeared to be a usual covenant from the question, that had arisen in old times upon the construction of such a covenant, whether an alienation by license determines the condition. *(b)* That is not a very good reason to show, that such a covenant is common in practice. At this day it certainly is. In this instance there is no reference to the usage: the reference is only to the propriety. If that question had arisen, before any decision had been made, subsequent to that of *Henderson* v. *Hay*, (c) I should be much inclined to think with Lord *Thurlow*, that the meaning is incidental covenants; not collateral covenants, which it might be very wise to impose, and to which many tenants would not object; but which ought to be the subject of treaty and separate agreement; not necessarily flowing from the agreement to let and to take. Therefore I am not of opinion decidedly, by any means, that the Master must introduce into the lease a covenant against under-letting, and my doubt upon that is a sufficient ground for not decreeing against the Plaintiff in the first instance. A reference to the Master will leave it open to further discussion.

(a) *Morgan* v *Slaughter*, 119 1 *Esp N. P. Cas.* 8
(b) *Dumper's* Case, 4 *Rep* (c) *Bro. C. C.* 632

1806.

JONES v. JONES.

But that is not the only doubt upon this case. It appears, though not clearly, from the answer, that there had been an under-letting in the time of the former proprietor. That, I collect, rather than that it was a recent under-letting. This question then arises; whether, supposing such a covenant ought to have been introduced into the lease in 1761, the

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fact of underletting, acquiesced under by the landlord, would not amount to a waiver; and, whether he could resort to the covenant again. It is determined, that such a covenant is at an end by a license once granted. (a) That question will deserve consideration, when the fact is ascertained, what has been the nature of the under-letting, and the conduct of the landlord, whether the covenant has not been waived; and upon that ground, whether it ought now to be introduced: independent of the other point, whether it ought originally to have been inserted. This is not therefore that clear case of a decree that would be nugatory, to entitle me to say, no lease ought to be executed; as it would be, if the party could immediately have gone to a Court of Law, to avail himself of the forfeiture

Therefore direct the Master to settle a lease according to the agreement of the 19th of *June* 1761; without prejudice to the question, whether the Plaintiff is entitled to a specific performance of the agreement. (b)

(a) *Dumpor's* Case, 4 *Rep.* 119
(b) *Vere* v. *Loveden*: the preceding case

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ROLLS. 1805. *Dec.* 19, 20. 1806. *March* 24.

Lien by possession of title-deeds disapproved; and not to be extended; with reference to the Statute of Frauds. In this instance it failed: the deeds being delivered, not as a present immediate security, but for the purpose of having a mortgage security created. (1)

NORRIS v. WILKINSON.

THE bill was filed by creditors of *James Wilkinson*, a Bankrupt, and his deceased father *Matthew Wilkinson*; who had carried on business in partnership as dyers; claiming the benefit of a security upon real estates, by a deposit of the title-deeds under these circumstances. *James Thompson* by his deposition stated, that in *May* 1803 he was employed as an Attorney by the Plaintiffs, on their own account, and as agents for *Mackintosh* and Co. in *America*, to obtain security from the *Wilkinsons* for debts of above 300*l.*, due to *Norris* and Co. and above 1000*l.* due to *Mackintosh* and Co. for articles supplied to the *Wilkinsons* in their trade; with directions, if neither payment nor the security could be obtained, to send for writs by the post of that day; that he went to *Leeds* where the *Wilkinsons* lived, with a

(1) See what is said in *Mandeville* v. *Welch*, 5 Wheaton, 284.

letter, requiring the security for the said debts, then due, and any other debts, which might become due to the Plaintiffs, upon their estates at *Leeds*; proposing, that *Matthew Wilkinson* should have power reserved by such security to raise 1500*l.*, to be preferred to the Plaintiff's security. *James Wilkinson*, coming to the deponent at the inn, represented, that his father was much indisposed, and could not be seen, and took the letter away to consult his father: the deponent observing, that, if his father was inclined to give the security required, the deponent would want the title-deeds of the estate. *James Wilkinson* soon returned, bringing with him, and delivering to the deponent, the title-deeds and a plan of the estate; at the same time saying, that as the balances due to the Plaintiff *Norris*, as agent for the one house, and as a partner in the other, were so very considerable, it was only right, he should be made easy; and that *Matthew Wilkinson* desired the deponent to prepare such security as *Norris* had required; and added, that it would have been more convenient for his father to have raised 1500*l.* upon a mortgage of the premises previous to giving *Norris* the security: but, if he could not wait, a power must be reserved for that purpose, to have priority of the security to the Plaintiffs. The deeds and plan were left in the custody of the deponent by *James Wilkinson*, for the express purpose of enabling the deponent to prepare the security; and he told *Wilkinson*, that, when securities of that nature were given, it was usual that the title-deeds should be left with the person to whom the security was given; and therefore he should give them into the hands of *Norris*, to be kept with the intended mortgage; to which *James Wilkinson* made no objection; and the deponent accordingly took them away. The deponent does not recollect *James Wilkinson* saying in terms, that he or his father did agree to the deposit of the deeds as a security: but it was perfectly understood between the deponent and *James Wilkinson*, previous to the latter going to consult his father, that, in case he agreed to give the security required, *Norris* would expect to have the possession of the original title-deeds, as well as the proposed security; and the deponent understood, *James Wilkinson* brought them for that purpose, and as instructions to prepare the deeds as a security from.

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The deponent further stated, that in *July* 1803, and about a week before the death of *Matthew Wilkinson*, the deponent offered to *James Wilkinson*, to be executed by him and his father, a conveyance, to secure the several debts then due, and which might become due from the *Wilkinsons* to the respective firms of the Plaintiffs, in respect of articles to be sold in the way of their trade. *James Wilkinson*, having expressed his approbation of the deed, and

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1806. NORRIS v. WILKINSON.

appointed two o'clock for the execution, took it away for the purpose of having it looked over by his Attorney; and returned at the time appointed for the execution without it; saying, his father was so extremely and alarmingly ill, that he could not trouble him on the subject of the security at that time; but requesting the deponent to inform *Norris*, he might make himself perfectly easy; for, if his father recovered he (*James Wilkinson*) was sure, his father would execute the same deeds of security; and he (*James Wilkinson*) would bring them over to *Norris* himself, without loss of time; and in case of his father's death, he (*James*) would immediately give *Norris* the security required, in order to make him easy.

The death of *Matthew Wilkinson* following immediately, the deed was not executed.

The Defendant, *James Wilkinson*, by his answer and depositions, represented the plan, proposed upon *Norris's* application for payment, thus; that *Matthew Wilkinson* should raise 1500*l.*, by way of mortgage; *Norris* undertaking to assist in procuring that sum; but, that failing, *Norris* proposed, that, if that sum could not be procured elsewhere, a mortgage security should be prepared to him or his principals for that sum, and that the money, actually due to the Plaintiffs according to the usual course of the trade, should be deducted; with a proviso, to enable *Wilkinson* to raise 1500*l.* elsewhere. *Matthew Wilkinson* agreed to that proposal, if he could not procure the money elsewhere. The letter, delivered by *Thompson* in *May* from
[195] *Norris*, stated, that he had not procured the loan; and sent *Thompson* to receive instructions for the proposed mortgage, according to the answer: the deposition stating only, that the latter required payment of the sums then due. Only part of the debts claimed were then due, the goods having been supplied upon a twelvemonth's credit. *Thompson* said, it would be necessary for him to see the title-deeds, to know, whether the title was good; and to extract some particulars to enable him to prepare the security. *Matthew Wilkinson*, being informed of this by the Defendant, strongly objected to parting with the deeds out of his own hands: but at length the Defendant prevailed upon him to consent to *Thompson's* seeing them; and he delivered them to the Defendant, with a strict charge to bring them back to him, after *Thompson* had extracted the particulars he wanted. After *Thompson* had looked at the deeds, he for the first time said, he must take them with him: to which *Wilkinson* objecting, and mentioning the charge he received from his father, *Thompson* appeared much offended, declaring, that *Norris* and he were incapable of taking any advantage; and the Defendant from his conduct and under the idea, that he wanted the deeds

merely as instructions, as he had intimated, and upon his representation, that the person lending the money would want to see the deeds, was prevailed on to permit him to take them with him, on which account his father was very much displeased with him. The Defendant objected to the deed, prepared by *Thompson*, as varying from the proposal; and it was disapproved by his Attorney, as going to secure all future debt. He denied, that he informed *Thompson*, that his father had consented to give the security required; or had desired him to deliver the deeds to *Thompson*, in order to prepare a sufficient security for the payment of the debts, and of any other debts, which might become due; [196] or, that the Defendant did deliver the deeds with such directions, and said, he would procure his father to execute them, &c., (according to *Thompson*'s evidence) insisting, that *Thompson* did not require the deeds to be given up to him as a security for the said debts, &c., or, that the Plaintiffs might have a lien thereon, that the only purpose, for which the Defendant delivered them, and the inducement held out to him, was merely to furnish instructions for the mortgage-security for the said loan, which *Thompson* assured him there was great probability of obtaining, and, if that should fail, then to instructions for preparing the conditional security before mentioned, and not to give a security for the said debts in the first instance.

1806.

NORRIS v. WILKINSON.

The Defendants submitted, whether the Plaintiffs have any lien upon the title-deeds and estates otherwise than as creditors, under a devise of *Matthew Wilkinson* for the payment of his debts.

Mr. Richards, and Mr. Bell, for the Plaintiffs, relied on the cases of deposits of deeds, *Russel* v. *Russel*, (a) *Featherstone* v. *Fenwick*, and *Hanford* v. *Carpenter*, (b) giving a lien, as importing an agreement to make a legal security, insisting, that the equity was in this instance strengthened by the special agreement.

Mr. Romilly, and Mr. Whishaw, for the Defendants.

The MASTER *of the* ROLLS—I own, that the cases, which have held the deposit of deeds to constitute a mortgage, have always appeared to me to rest on very unsatisfactory grounds. If any act appeared, so unerringly speaking its purpose, that a Court could infer, and execute such purpose, without the aid of any extrinsic testimony, a written declaration of the purpose might appear to be altogether superfluous. But, the mere fact, that the title-deeds of one man's estate are found in the possession of another, is [197]

(a) 1 Bro. C. C. 269. *Ex parte Cowley*, *ante*, vol. ix. 115. *Ex parte Wetherell*. *Ex parte Haigh*, *ante*, vol. xi. 308, 10.

(b) 1 Bro. C. C. 270.

1806.

NEWMAN v. WARNFORD.

not of this description. It is a fact, that may exist without any contract whatever: or it may result from a contract, of which it does not in any degree discover the particulars and details. If for these we are to resort to parol testimony, the effect to be given to the possession depends not on any inference, which it of itself affords; but on the evidence, by which the nature and the object of such possession shall have been ascertained; and how can that evidence be let in consistently with the Statute of Frauds? (*a*)

In the case of *Russel* v. *Russel* (*b*) an issue was directed to try, with what intention the lease was delivered. The fact of delivery was to have no operation till the purpose of the delivery should be ascertained. So that, whether an interest in land did, or did not pass, was to depend on the testimony of witnesses, and not on any written contract between the parties. I do not see, why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the Statute. There is no case, where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines, specifying the purpose for which he had parted with
[198] them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury, which the Statute was calculated to exclude.

However, notwithstanding my doubts concerning the principle of the cases to which I have been alluding, I may think myself bound to follow them, as far as they have gone: but I feel no disposition to go beyond them. Where the deposit is made at the same time that money is advanced, there is little to be supplied with reference to the nature of the agreement. It is obvious, that the purpose of the deposit must be to secure the repayment of the money.

The connexion is not so direct between a debt antecedently due and a subsequent deposit: nor is the inference so plain. But, what is the kind of case now before the Court? Here are persons in trade, dealing with each other on credit. Some debts are due: some contracted; but the term of payment not yet arrived. New dealings may every day give rise to new debts. Under these circumstances what is to be gathered from the mere fact of a deposit of deeds; supposing the transaction to be of that nature? Is the deposit to be a security only for the debt due, or also for the debt contracted? The Plaintiffs say, they were to have a security for every thing due, or to grow due. The Defendants contend, that it never was in contemplation to give a

(*a*) Stat. 29 *Ch. 2. c.* 3. The same opinion upon this subject is expressed by Lord *Eldon*. See *Ex parte Coming*, *ante*, vol. ix. 115. *Ex parte Wetherell*. *Ex parte Haigh*, *ante*, vol. xi. 398. 403.

(*b*) 1 *Bro. C. C.* 269.

security for more than the sum, of which the term of payment had previously elapsed. 1806.

As I am of opinion, that this is not a case of a deposit of deeds, I am relieved from the necessity of considering, how far I should have been bound by former decisions to proceed upon parol testimony in a case, circumstanced as this is. It is clear, that these deeds, if voluntarily delivered at all, were not delivered by way of deposit, in the sense, in which that word has been used in the cases: *i. e.* as a present and immediate security; but were delivered only for the purpose of enabling the Attorney to draw the mortgage, which, it is alleged, *Wilkinson* the father had agreed to give. Passing by all the objections, made to *Thompson's* testimony, and all consideration of the particulars, in which it is contradicted by the deposition of *Wilkinson*, and taking it exactly as it stands, it does in every part of it prove what I have stated, with respect to the purpose for which the deeds were put into his hands. Now in all the cases, that have been referred to, the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance, whenever it should be required. But the primary intention was to execute an immediate pledge; with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose.

Norris v. Wilkinson.

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But here there was no intention to put the deeds into pledge. That was not the thing, which any of the parties had in contemplation. All that is alleged, is, that *Wilkinson* had undertaken to execute a mortgage, when a mortgage should be prepared; and it is admitted, that the delivery of the deeds was to be made only a step towards its preparation. Can the accident of the death of the intended mortgagor give to such delivery an effect, which originally it was not intended to have?

In *Brizick* v. *Manners* (a) it appears, that *Mr. Manners*, the Defendant's father, had agreed to give a mortgage to the Plaintiff; and had delivered the title-deed to an Attorney, with written instructions for preparing the mortgage. But *Mr. Manners* dying soon afterwards, the mortgage was not executed. The Plaintiff by his bill claimed to be considered as a mortgagee for the sum, intended to have been secured. But Lord *Hardwicke* states, that the point had been given up.

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In the late case, *Ex parte Coming*, (a) this question did not arise; for it was by way of deposit that the deeds were set apart, and placed in the wife's custody.

It has been intimated, that there have been cases, in which the effect of a deposit has been given to a delivery

(a) 9 *Mod.* 284. (a) p. 200. *Ante*, vol. ix. 115.

1806 of deeds, made for the mere purpose of having a mortgage drawn. I will give the Counsel an opportunity of looking for such cases: but, if none can be produced, I must hold, that the Plaintiffs have no lien on the estates in question.

Norris v. Wilkinson

1806 March 24 The Plaintiffs' counsel admitting, they could find no authority, the decree was taken accordingly

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March 8

EASTHAM v LIDDELL.

Depositions referred for scandal upon motion of course, without notice.

A MOTION was made, as of course, without notice, to refer depositions for scandal

Mr. Martin, in support of the Motion, observed, though the practice is so as to answers, (a) there is no authority as to depositions.

The Lord CHANCELLOR made the Order.

(a) Hind Ch Pr 254

March 10.

HENNEGAL v. EVANCE.

A person having attended under a subpœna as a witness, but refusing to be sworn, ordered to attend to be examined, or stand committed.

A PERSON had been twice before the Examiner under a subpœna as a witness; but refused to be sworn; alleging generally, that the principles of his religion did not authorize him; but not stating any particulars.

Mr. Wingfield, upon affidavit of the circumstances, moved for an order, that the witness attend to be examined, or stand committed, observing, that this practice, as laid down, relates to witnesses, who had not attended (a)

The Lord CHANCELLOR made the Order

(a) Hind Ch Pr 329, 330 This practice is there stated as to a witness, who, having been sworn to the interrogatories, afterwards refuses or neglects to attend to be examined

1806.

March 8.

RIDER v. KIDDER.

The practice of personal service, as a foundation for process of contempt, dispensed with, where the party must have notice; as upon a short order for execution of a decree.

A MOTION was made by the Plaintiff, for a short order upon the Defendant, to transfer the stock under the decree in this cause; *(a)* and that service upon the Clerk in Court may be good service.

Mr. Bell, for the Defendant, opposed the motion; insisting upon the general rule, that nothing can be done for the purpose of bringing a man into contempt without personal service. An attachment will not issue, except upon personal service of the writ of execution of the decree; and the Court giving the indulgence of a short order, which is not the regular process of the Court, will not put the Defendant in a worse situation.

The Solicitor-General, and Mr. Hart, in support of the Motion, took the distinction, that this application being for service of the writ of execution of the decree, the Defendant being present in Court, must have had notice; and the only object of requiring personal service is to prevent surprise. It was observed, that the reason of applying for a short order is to prevent expense.

The Lord CHANCELLOR.—The practice in this Court, that in order to fix a person with contempt, the service must be personal, has a strong analogy to the practice in Courts of Common Law upon attachment. (1) The service must be personal, unless upon some very special application it is dispensed with; which may be under circumstances certainly. The reason of requiring personal service is, *non constat*, that there is a contempt; that the party knows that he has neglected to do any thing he was called upon to perform. But in this instance, a decree made, when the Defendant was present in Court, she knows she has not done what she was directed to do, and must therefore be conscious, that she is in contempt. If this course cannot be taken, the Defendant might, when called upon to pay money, keep out of the way; and so prevent the effect of a decree or order made, when he was present in Court.

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The same point arising in the case of *De Manneville* v *De Manneville, (a)* the order in this case was postponed; that the practice might be looked into.

(a) Reported, *ante*, vol. x. 360. *(a)* p. 203. The next case.

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(1) See *Hollingsworth* v. *Duane*, Wallace's Rep. 141. See also 12 Johns. Rep. 534.

1806.

March 10

DE MANNEVILLE v. DE MANNENILLE.

The practice for personal service, as a foundation for process of contempt, dispensed with under circumstances, a party declaring he would not execute an order, and absconding to avoid it.

IN this cause (*a*) the Defendant, upon an application on the ground of his inability to find security, obtained an order to go before the Master, and enter into his own recognizance. The Defendant not having complied with that order, a motion was made for an order, that the Defendant should within a fortnight execute the recognizance settled by the Master; and that service upon his Clerk in Court may be deemed good service; upon affidavit, that he said, he would not give the security, that he conceals himself, and has no ascertained place of residence.

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* *The Solicitor-General, Mr. Fonblanque, and Mr. Cooke, in support of the Motion.*—There is no doubt, that generally there must be personal service to bring a person into contempt: but under such circumstances as these, every mode having been tried in vain to serve this party, who has declared, that he never will execute this recognizance, and keeps out of the way on purpose to avoid it, the Court will make this order: otherwise parties may set the orders of the Court at defiance. This practice is not confined to the service of execution of an order; but applies to any process upon which attachment is to issue. There are two direct authorities: *Ratcliff* v. *Roper;* (*a*) and *Thompson* v. *Jones.* (*b*) The latter was a case upon subpœna to appear and answer in the case of an infant; which was served upon the guardian; and upon that service a motion was made for an attachment against the infant, and it was ordered; and upon that occasion Lord *Eldon* found another case, *Smith* v. *Marshall;* in which service upon the mother of the infant was ordered to be good service. The case of *Sir William Pulteney* v. *Shelton* (*c*) is another instance.

Mr. Daniel (amicus Curiæ) mentioned the case of *Henley* v. *Brooke;* (*d*) in which, an order, having been made upon a lady, in the country, to pay 200*l.*, upon affidavit of repeated attempts in vain to serve her, and her constant habit of keeping her door locked, and only appearing at the window, an order was made, that service upon the Clerk in Court should be good service.

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Mr. Bell, for the Defendant, gave up the point, upon these authorities; referring also, in confirmation of them, to the passage in the last edition of the Practical Register, (*a*) where the Defendant was not to be found; and it was

(*a*) Reported, *ante*, vol. v. 52. (*a*) p. 204. 1 *P. Wms.* 419.
(*b*) M S. Before Lord *Eldon*, 23d *Feb.* 1803.
(*c*) *Ante*, vol. v. 147. (*d*) In Chancery, before Lord *Eldon*, *April* 23, 1803. (*a*) p. 205. Pr. Reg. Edition by Mr. Wyatt, 207

thereupon ordered, that service of a decretal order and writ of execution on the Clerk in Court should be good.

1806.

DE MANNE-VILLE v. DE MANNE-VILLE.

The Lord CHANCELLOR.—I had no difficulty upon this point, when it was first mentioned; but would not hastily decide a question of practice, especially upon so important a subject. Persons are bound civilly by service upon those, who are appointed to represent their civil interests. But, to subject a party to the consequences of a contempt, personal service is required. If, however, it appears plainly, that he has notice, that he knows what is demanded of him by the Court, that an order has been made upon him, and process has issued, which he professes that he will not obey, it cannot be maintained, that he shall not be attached; and that service upon his Clerk in Court shall not be good service. This Defendant, under an order to give security, has been treated with great indulgence by the late *Lord Chancellor*; permitting him, alleging his incapacity to give the security required, to substitute his own recognizance. He is involved in no manner of difficulty in obeying this order. I shall therefore, under the circumstances of this case, order service upon the Clerk in Court to be a good service.

Another instance has been mentioned to me by the Register; *Edwards* v. *Poole*. (*b*) It is the constant course in the Court of King's Bench upon attachment. (*a*)

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(*b*) *Feb.* 28, 1789. Service of the writ of execution of an order upon the Defendant's Clerk in Court good service; the Defendant abscouding.

(*a*) *Rider* v. *Kidder*; the preceding case.

HOLMES v. COGHILL.

March 10, 11.

Distinction between a power and absolute property. A power, unless executed not assets for debts. Power executed by will; but afterwards discharged; and a new power created. A subsequent codicil will not by the mere effect of republishing the will be an execution of the power.

Though Equity will, in certain cases, aid a defective execution of a power, the want of execution cannot be supplied even for creditors.

THIS cause came before The Lord *Chancellor* upon an appeal by the Plaintiffs, from the decree pronounced at the Rolls. (*a*)

The Solicitor-General, and Mr. Hall, for the Plaintiffs, Appellants.—The general question is, whether the sum of 2000*l.*, which Sir *John Coghill* had power to raise, is to be considered as assets. The first ground, upon which that may be maintained, is, that *jus disponendi* is to be considered as

(*a*) Reported, *ante*, vol. vii. 499.

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HOLMES v. COUKELL.

property itself, upon several authorities: *Goodtitle* v. *Otway*, (*b*) *Maskelyne* v. *Maskelyne*, (*c*) *Tomlinson* v. *Dighton*, (*d*) *Robinson* v. *Dusgale*, (*e*) *Pease* v. *Mead*, (*f*) *Maddison* v. *Andrew*, (*g*) *Thompson* v. *Towne*, (*h*) *Troughton* v. *Troughton*. (*i*) If there is no case directly in point, where the precise question has been raised, the result of all these authorities, with the *dictum* of Lord *Hardwicke*, as stated by *Atkyns* in *Bainton* v. *Ward*, (*k*) is, that a general power of disposition, not restrained as to the objects or the mode, is in effect property: the distinction between power and property being, that the former is subject to some restraint, either as to the objects or the mode of disposition; the latter consisting in general and unconfined dominion.

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2dly, Considering this as mere power at the date of the will unquestionably the testator intended to execute his power in favour of his creditors: that power which was then in force; though afterwards rescinded. That intention is transferred to the power under the new settlement by the codicil, subsequent to that settlement; which codicil was a republication of the will. Whether that is the legal effect, or not, the testator evidently conceived, that he had provided for his debts in that way.

The codicil is incorporated with the will: both making one instrument, speaking and having effect at the date of the codicil. The effect of the republication, therefore, would be to pass lands, purchased between the dates of the will and codicil; if the language of the will was sufficiently comprehensive, and they were duly executed; though a specific intention to republish the will did not appear in the codicil. (*a*)

There is no doubt, where an attempt is made to execute a power in favour of creditors but the execution is defective, as, if there is only one witness, three being necessary, the defect will be supplied, upon the established law of the Court: *Tollet* v. *Tollet*, (*b*) and many other cases. The law of the Court is also admitted, that, if a power is executed in due form, but in favour of a volunteer, the Court will take the subject from that person; and give it to the creditors of him, who had the power. (*a*) But it is said, where there is a complete want of execution, it cannot be supplied for creditors; and certainly there is no decision, that it can. But, if that cannot be done, and this decision is right, the state of the law upon this subject is extraordina-

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(*b*) 2 *Wils.* 6. (*c*) *Amb.* 750. (*d*) 1 *P. Will.* 149. *Salk.* 239. 10 *Mod.* 31. *Com.* 194. 2 *Eq. Ca. Ab.* 309. *Pl.* 13. (*e*) 2 *Vern.* 181. (*f*) *Hob.* 9. (*g*) 1 *Ves.* 57. (*h*) 2 *Vern.* 319. 1 *Eq. Ca. Ab.* 242. *Pr. Ch.* 52. (*i*) 3 *Atk.* 656. 1 *Ves.* 86.

(*k*) 1 *Atk.* 172, stated from the Register's book, *ante*, vol. vii. 503. Note (*b*).

(*a*) *Pigott* v. *Waller*, *ante*, vol. vii. 98.

(*b*) p. 207. 2 *P. Will.* 189. (*a*) p. 208. *George* v. *Milbanke*, *ante*, vol. ix. 190.

1806.

HOLMES v. COGHILL.

ry. The Court has no regard for the form of executing such a power; if the intention to execute it in favour of the creditors is apparent; but will supply any defect of form. Neither, where due attention is given to the form, but the power is executed in favour of a stranger, does the Court regard the substance; but in favour of creditors takes the subject from that person, for whom alone the intention is declared. It is then very extraordinary, if, the Court disregarding, in the one case the form, in the other the substance, yet something must be done, to give the Court jurisdiction. *The Master of the Rolls*, in his judgment, proceeds entirely upon the ground, that the parties have contracted, it is true, that the power shall be executed; but in a given way. That reasoning would be substantial, if the Court had not said, that they will not, where creditors are concerned, regard the form. Upon what solid distinction, though nothing has been done, is the contract to be regarded, where creditors are concerned? The Court will not, unless bound by authorities, act upon a distinction so unsatisfactory.

Mr. Alexander, and Mr. Fonblanque, in support of the Decree.—If this is not power, there can be no such thing as a general power. The cases relied upon are cases of absolute property. Is every general power to be considered a trust for creditors? It is surprising, as *The Master of the Rolls* observes, how the Court came to break in upon contract by assuming this jurisdiction; upon what principle the Court affects the stipulation in a contract upon consideration of marriage, the most valuable of any, that the estate of the son shall bear a particular burthen, if charged in a particular way; though the charge is not made according to that stipulation. The case of volunteers is very different. There the stipulation has been performed: it is indifferent to the owner of the estate, whether the charge is in favour of creditors or volunteers; and the Court acts upon the estate, charged according to the power. Upon this subject the Court ought not to go further than they are compelled by authority. It is admitted, there is no case in which this has been done. The absence of authority is strong evidence of what is the law, and the distinctions between power and property, and between non-execution and a defective execution of a power, have been frequently acknowledged: *Lassels* v. *Lord Cornwallis*, (*a*) *Tollet* v. *Tollet*, (*b*) *Lord Townshend* v. *Windham*: (*c*) a uniform series of *dicta*, establishing the distinction in the clearest terms; that the Court will do this injustice to a certain extent, but no further. *Animus*, as well as *jus*, *disponendi* is required. In *Lord Townshend* v. *Windham*, Lord *Hard-*

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(*a*) 2 *Vern.* 465. *Pr. Ch.* 232. (*b*) 2 *P. Wms.* 489. (*c*) 2 *Ves.* 1.

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wicke distinctly disclaims the doctrine he is supposed to have expressed in *Bainton* v. *Ward; (d)* which case, when examined, appears not to be an authority for it. In supplying the want of a surrender the Court has refused to go so far as natural children; though the motive is * equal at least: so as to grand-children, which was determined by the House of Lords; *(a)* and in a late attempt against that authority (*b*) Lord *Eldon* stopped the argument.

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With respect to the constructive republication, *The Master of the Rolls* must have formed a clear judgment; having not long before, in deciding *Pigott* v. *Waller*, *(c)* traced the doctrine of republication through all the authorities. None of them have any resemblance to this case. The utmost length they have gone is, where apposite words were found. If a man devises his estate in the County of *Norfolk*, and afterwards sells that estate, and purchases an estate in the County of *Kent*, and after that purchase a constructive republication takes place, the new estate cannot pass; for apposite words, to reach the subject, must be found in the will.

The Solicitor-General, in Reply.—It cannot be said there is any principle in this distinction. This is not matter of positive law. The whole doctrine is the creation of this Court; founded upon principles of natural justice. All the *dicta* that do not relate to the case of creditors, have no relation to the subject; for the question as to supplying defects in favour of a wife or children is very different. No instance has occurred, that a power being executed in due form, but for a stranger, the Court has taken the subject from him for a wife or children; though it would for creditors. *(d)*

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The Lord CHANCELLOR.—Suppose a power informally executed for a stranger: would the Court first supply the defect, and then give the fund to creditors?

Reply.—That is a very material case. Certainly there is no authority for that: but it would be very reasonable. The consideration is, not what the party has done, or intended to do; but what it is just he should have done; and as he has contracted for a power to increase the fund for his debts, it is considered just that he shall do so; though he may have in the most formal and express terms declared, that he does not intend that; but means to give to a stranger. He is supposed to have done that which he had power to do, and ought to have done.

(d) 2 *Atk.* 172, stated from the Register's book, *ante*, vol. vii. 503, Note (*b*). (*a*) *Kettle* v. *Townshend*, 1 *Salk.* 187.
(*b*) *Perry* v. *Whitehead*, *ante*, vol. vi. 544.
(*c*) *Ante*, vol. vii. 98.
(*d*) p. 210. *George* v. *Milbanke*, *ante*, vol. ix. 190

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The reasons upon which the judgment at the Rolls proceeds, that the compact is to raise the money, not absolutely, and in all events, but in a certain manner, that the chance, that it may never be executed, or not in the manner prescribed, is an advantage the party secures by the agreement, which no one has a right to take from him, are adapted to the case, as it is at Law; but exclude the universal doctrine of this Court. However difficult, as *The Master of the Rolls* observes, it is, to discover a sound principle for the authority this Court assumes for aiding a defective execution in certain cases, that principle has been long established; and, where creditors are concerned, it extends to the non-execution, as well as a defective execution. When the Court has gone so far as to pay no regard to the form, if the intention appear, and so far in favour of creditors as to pay no regard to the intention, if the form has been pursued, what does the Court regard in opposition to the claim of creditors? [212]

The Lord CHANCELLOR.—It is much to be regretted, that the right of creditors to receive satisfaction out of the estate of their debtor should depend upon either artificial modes of conveyancing, or artificial rules of law, clashing with each other; and not to be reconciled to clear principles of Law or Equity. I confess I am not able to reconcile what a Court of Equity has been in the constant habit of doing, and what it has refused to do. Upon the second settlement Sir *John Coghill* had only beyond his estate for life the right, if he chose to exercise it, to call upon the trustees to raise this sum of 2000*l.*; or, if that sum should not be raised in his life, to direct that it should be raised in the way provided, by deed or will, with two or more witnesses. If this is to be considered as contract, and the property to go according to this deed, the conclusion upon principle must be, that the son might say that estate was his to all intents and purposes, as the survivor; conveyed to him for valuable consideration; subject to the right, vested by the deed in his father, to call upon the trustees to raise this sum of money; which right he might exercise or not: yet it is admitted without any difference of opinion, and all the authorities are uniform, that, if Sir *John Coghill*, the father, had by his will, without any witness, given that sum of money in satisfaction of his creditors, a Court of Equity would have given effect to that disposition, though not within the language of the power. A Court of Equity therefore certainly in favour of creditors takes upon itself to disregard altogether the quality of the deed: to alter wholly the rights of the parties under it. Sir *John Coghill*, though bound to pay his creditors, could not be called upon by Law to pay them out of an estate, which is the property of another person. Yet Equity does so strong an act as to pay them out [213]

1808.

HOLMES v. COGHILL.

Power defectively executed for a stranger

Whether the Court would supply the defect, and give the fund to creditors, *Query*

of the estate, which was vested, not in him, but in his son; and it is not denied, according to the case I put, that, if by this will, unexecuted, Sir *John Coghill* had given the fund to a stranger, the Court would still have laid hold of it; in favour of creditors not only giving effect to an act done defectively, but changing the purpose, and converting that act. This appears to me to go this length, that Equity considers this so much the property of the person, as contradistinguished from power, that, though the estate ought in Law to be affected only by an act consistent with the deed, being vested in another person, until an act shall be done, as prescribed by the deed, yet in favour of creditors Equity acts in this manner upon a principle, which, to make it consistent, seems to entitle it to go a good deal further

The distinction was pressed in the most powerful manner in support of this appeal, that, where an estate or interest, to be created under that power, is qualified or limited to a third person, the power must be executed but, when the end and object of the power are to secure the benefit to the party himself by calling upon trustees in his life, or by his will, where it is entirely for his own use, purpose, and object, no qualification of the estate no interest vested, in a third person, but the interest is to be vested in him by an act, to be done by himself there is no good reason that I can comprehend, why the Court should not act upon it for creditors, considering it property, as much as by invading the deed, getting out of an estate, vested in another person, a fund for creditors, though the act is done in such a manner

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as not to take it out of the party, who has the estate It cannot be represented, as the foundation of this appeal, that in making the decree *The Master of the Rolls* has deviated from any rule or principle of this Court, or departed from any decided authority, for it is admitted, that there is rather a ground for criticism upon the Court, and the exercise of this jurisdiction, which I confess it seems to me very difficult to answer, that the Court has not done more. But in no one instance has the Court gone the length, required of me, not in an original cause, but upon an appeal from the decision of a judge, for whose opinion I have the highest respect The authorities are most important, and follow in a series from the year 1668 to the end of Lord *Hardwicke*'s time, from which it appears, that the distinction between the non-execution, and the defective execution, of a power has been constantly taken But, if the argument in support of this appeal prevails, there must be an end of that distinction, for, if ever there was a power, this is one, and if it is to be maintained, that wherever the execution of a power brings the fund into the party, to whom the power is given, it is absolute property, no power, but a mere naked power can exist

1808.

HOLMES v. COGHILL.

It cannot be maintained that this is absolutely property, so as to be assets for creditors, without any act done, except by striking at once out of the books the very notion and character of a power. If I held, that it was not necessary, that any thing should be done by Sir *John Coghill*, as he was the person, for whose benefit the power was created, but that, whatever may have been the forms prescribed, and the acts to be done, the fund would at once go to executors, without any interference of the Court, though the estate was vested in the son, not to be taken out of him without an act done, it is the same as if the power did not exist. If that cannot be laid down as the rule, and clearly it cannot, there is no other ground upon which it can stand; [215] for, if once the power is admitted to be one, that should be executed, and the fund does not go at once to executors, without regard to creditors, it is a power that must be executed; and then the great question arises, to what extent a Court of Equity will interfere.

It was urged very ably, that no authorities have been cited that can bind me, as they go only to this length; that Lord *Hardwicke* and other Chancellors have said, there is a difference between the non-execution and the defective execution of a power. But all these cases establish this; that in no instance, even in favour of creditors, has the Court interposed against a non-execution; and though in the particular instance that might not be before the Court, yet, if that distinction did not prevail, Lord *Hardwicke* would never have expressed himself, as he did, in *Lord Townshend* v. *Windham*. (*a*) The appellants are obliged to admit, that Lord *Hardwicke* must have considered that to be the rule of the Court applicable to this case; and having no way of getting out of that but by setting off against it in the case of *Bainton* v. *Ward*; (*b*) but in that case there had been an execution of the power; and then, that is not a proper application of Lord *Hardwicke's* declaration, which supposes him to contradict every thing he said upon every previous occasion, and afterwards, and not as speaking with reference to the particular case before Court. If Lord *Hardwicke* is considered as speaking with reference to that particular case, all is consistent; that a Court of Equity goes the length of supplying defects in the execution of a power; but has left to the person, who has the power, whether he will execute, or not. You must have intention: some act indicating an intention to [216] execute; and then, though it is done imperfectly, he shall be considered as executing it; and the Court will help him out, for the purpose of justice, in the particular instances of persons, who are the favourites of this Court, as they are

(*a*) 2 *Ves.* 1. (*b*) Stated from the Register's book, *ante*, vol. vii. 603. Note (*b*).

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HOLMES v. COWCRX.

the favourites of justice. The case stated of the copyhold is apposite. This Court supplies the surrender, but not the will, for creditors. There must be the will: then the Court, informed of the intention by that will: completes it, as in the other case, supplying the surrender.

Want of surrender supplied, if copyhold estate is devised for debts

For these reasons, it is impossible for me to attempt to make a precedent in this case. I lament, that these difficulties and inconsistencies are to be found upon this subject. They are for the consideration of the Legislature; who may declare, that, where a power is given to dispose of property by a certain act, if the party dies without doing that act, still it shall be assets. But I must take great care not to extend the jurisdiction, and begin by doing that which has never been done by any of my predecessors. My opinion is therefore, that this decree should be affirmed

In the HOUSE of LORDS

The Countess of *Lincoln*, and others. - - Appellants;

The Duke of *Newcastle*, and others. - Respondents.

A PEDIGREE of the family of his Grace the Duke of NEWCASTLE.

HENRY, DUKE OF NEWCASTLE.
died 1794.

- Henry, Earl of Lincoln, died 1778.
- Frances, now Dowager Countess of Lincoln. **APPELLANT**
- Thomas, Duke of Newcastle, died 1795.
- Lady Anna Maria Stanhope.
- Lord John Pelham Clinton, died 1781 S. P.

- Henry, on his father's death called Earl of Lincoln, died in 1779. **APPELLANT.**
- William, called Viscount Folkestone, **APPELLANT.**
- Catherine, now Viscountess Folkestone,
- Henry Duke of Newcastle, an Infant, **RESPONDENT.**
- Lord Thomas Pelham Pelham Clinton an Infant, **RESPONDENT.**
- Lady Anna Maria Cotton.
- Lady Charlotte Pelham Pelham Clinton, an Infant.

1808. his marriage, the covenant in the deed of 1773 ought to be construed agreeably to the trust in the deed of 1773.

THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE.

J. Mansfield.
S. Romilly.

Reasons, alleged by the respondents for affirming the decree.

1st. This bill called upon the Court, to execute a covenant of Duke *Henry*, contained in the settlement made on the marriage of his son, with regard to the leasehold premises in question; which are holden for years. The covenant was expressly to do a *future* act, and the trusts therefore to arise under it were purely *executory*. The covenant, which the Court is thus called upon to execute, (and on the face of which it appears that the Duke was aware of the different natures of freehold and leasehold property, which rendered the limitations of the former inapplicable in a great degree to the latter,) is, that he the said Duke should well and sufficiently "transfer and assign to the trustees, their "executors, administrators, and assigns, the said Manor of "*Newark*, &c. and all the estate and interest which the "said Duke then had, or should have, or be entitled to, in "the said leasehold premises; to hold to the said trustees,
[222] "their executors, administrators, and assigns, in trust, *for* "*and for the benefit of such person and persons, and for* "*such or the like estate and estates, and for such or the like* "*ends, intents and purposes*, as are therein-before mention-"ed, of and concerning the said castles, honours, &c. as "far as the law would in that case allow or permit." The Court therefore has to consider, who those *persons* were, so to be *benefited*: what those ends, intents, and purposes, were, so to be answered; and what estates or limitations of the leasehold property, which could be *allowed or permitted by law*, were best calculated to *benefit* those *persons*, and to answer those *ends, intents, and purposes*. To ascertain these several matters, reference must be had to the limitations of the freehold estates: from which it appears, that the *first and other sons* of the Earl of *Lincoln*, and of Lord *Thomas* and of Lord *John*, &c. were to take in *succession*; and that the estates thereby limited to them, were such as would not enable any one of them to acquire an *absolute* interest, and thereby defeat the subsequent limitations, before such person had *attained the age of twenty-one years*: but the leasehold estate, from its *nature* was incapable *of the same limitations*. The *moment* it vested in a tenant in tail, it vested *absolutely*. How then were the limitations of the leasehold to be made to correspond *in effect* the most nearly with those of the freehold? *By preventing its vesting under the age of twenty-one*. By this operation, the succession of the leasehold was insured nearly to the ex-

tent, in which that of the freehold was by the limitations of the settlement. If it be said, that by *suspending* the vesting of the *leasehold* in the person, in whom the *freehold* is *vested* by the settlement, the covenant of the settlers, with regard to assigning the leasehold *for the like estates* as the freehold, is not complied with, the answer is, that it is most manifest, that the general or primary *end, intent, and purpose* of the settlement, was to *ensure the succession*; and that the limitation of the estates was merely the mode of effecting that object. And therefore, that, whatever may be the case with respect to trusts executed, yet, in a case of a trust clearly *executory*, as this is, the Court will effect such general object by such means as are best calculated for that purpose. 1806. THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE. [223]

2d. If it be said, that what is required by this bill did not go to the *utmost extent* of what the law *might do*, in suspending the vesting of the leasehold, and that the Court cannot take upon itself to prescribe limits, in the modification of estates, which the parties to the settlement have not themselves prescribed, it may be answered, that the intention of the parties, which the Court is called upon to carry into effect, *is not* to suspend the vesting *to the utmost extent, that might be by law:* but *it is* to settle the leasehold for the benefit of *such persons*, and for such estates, and for such *ends, intents, and purposes*, as were before declared of the freehold, *so far* as the law would allow; and surely it is competent to the Court to *decide, what* limitations, or modifications of the leasehold are best calculated to answer such intention. It is a difficulty, not greater than the Court is in the daily habit of encountering.

3d. With respect to authorities—it is submitted on the part of the respondents, that the cases of *Stanley* v. *Leigh*, (*a*) and *Gower* v. *Grosvenor* (*b*) (in particular) warrant the prayer of this bill. Those cases speak of this mode of limitation of leaseholds, as part of the *known law* of the Court, in cases, where the Court is *called upon* to direct the conveyance. But the numerous cases, to be found on the subject of executing marriage articles, are all *in principle* authorities in favour of the respondents; and it is unnecessary in this case to consider the decisions of the Court in cases, where the parties have taken upon themselves by will or settlement to *execute their own intentions*, or, (in other words,) where the the trusts have been *finally declared* by the instruments themselves. [224]

Sp. Perceval.
T. M. Sutton

(*a*) *Stanley* v. *Leigh*, 2 P. Wms. 686.
(*b*) *Gower* v. *Grosvenor*, Barnard. Chan. Rep. 54.

1806.

THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE.

This appeal, having been argued at the bar of the House of Lords on the 17th, 18th, and 24th of *February*, stood for judgment.

April 14. *Lord* ELLENBOROUGH, Chief Justice, having stated the case, spoke to the following effect:

The object of this covenant was to oblige the Duke of *Newcastle* to settle these leasehold estates in like manner as the freehold estates were settled, by the terms of the deed. But the effect of the different nature of the estates is familiar; that a tenant in tail acquires when of age, the power of unsettling an estate of inheritance by suffering a recovery: but, if personal estate is included in that limitation, the absolute interest, transmissible, is vested in him upon his birth. Contemplating the effect of this settlement upon property of these different natures, the question with reference to this covenant is, how far the law will allow the transmission of personal estate to be assimilated to that of the inheritance: so as to make the one attendant upon the other, in a fair sense and meaning, to go in the same line of succession. Such is the nature of personal estate, that a [225] person, claiming it under a limitation in tail, acquires, unless there is a provision to the contrary, the absolute indefeasible interest, and the effect is, that the line of succession with the freehold estate will be broken. There is a known mode, perfectly familiar to conveyancers, by which that is postponed to a more distant period; by letting the term continue in trustees, upon trust to pay the rents and profits to the *cestuy que trust* until the age of 21, and to assign to him at that period; with a limitation over in the event of his death under that age; by which provision the ulterior limitation, which would otherwise be frustrated, the term vesting absolutely in the tenant in tail, is preserved. This practice of conveyancers is referred to by Lord *Macclesfield*, by Sir *Joseph Jekyll*, in *Stanley* v. *Leigh*, (*a*) and afterwards by Lord *Hardwicke* in *Gower* v. *Grosvenor*. (*b*)

Settlement of a term for years.

Upon that practice, though established by these authorities, some doubt has been thrown by subsequent decisions; one of which is *Foley* v. *Burnell*, (*c*) before Lord *Thurlow*, and afterwards before the Lords Commissioners, Lord *Loughborough*, Mr. Justice *Ashhurst*, and Baron *Hotham*. In that case Lord Commissioner *Ashhurst*, takes a distinction, (whether it is perfectly satisfactory, or not, I do not say,) between articles or covenant, and a will; where the testator takes upon himself to be his own conveyancer; prescribing the particular mode of limitation. That case was

(*a*) 2 *P. Will.* 686. See page 689. (*b*) *Barnard. Cha. Rep.* 54.
(*c*) 1 *Bro. C. C.* 274.

followed by *Vaughan* v. *Burslem*: *(d)* a decision by Lord *Thurlow*, which I cannot reconcile with the decree in this cause. But this distinction appears. That also was the case of a will: the testator executing his own purpose: in * this instance there is a covenant to do this by any practicable mode: the only question is, whether it is legal or not. If it is legal, effect ought to be given to it by any mode. 1806. THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE. [* 226]

The decree, which is the subject of this appeal, is in conformity to the decisions of Lord *Macclesfield* and Lord *Hardwicke*; and stands upon principles, allowed up to the period of *Vaughan* v. *Burslem*. The intention is clear. It is impossible for a party to express more plainly his meaning and wish, that this leasehold estate, so essential to the dignity and consequence of this family, and necessary for a variety of purposes of convenience, should go with the freehold estates, as far as the law would allow; which object will be attained by preventing the first tenant in tail from taking the absolute property; letting it go over; and considering it vested in the present Duke; who, it is said, has attained the age of 21; and therefore acquired the absolute property. I propose, therefore, to your Lordships, that this decree shall be rectified by preserving the declaration, that this settlement, so far as respects the performance of the covenant as to the leasehold manor and premises at *Newark*, ought to be established, and the trusts performed, and carried into execution; and that the said manor and premises ought to be settled, subject to the charges and incumbrances, in trust for the respondent *Henry* Duke of *Newcastle*, his executors, administrators, and assigns; who has since the time, at which this decree was pronounced, attained the age of 21; omitting the subsequent limitations.

Lord ELDON.—I requested your Lordships to postpone Judgment in this cause from my conviction, that this decree is wrong, upon the principle, stated by the noble and learned Lord who has preceded me; and from the very strong opinion I have, that it is wrong upon many other points; and, that the mode, in which the noble and learned Lord proposes to alter it, is unsanctioned by precedent, and is contradicted by the decision of Lord *Thurlow*. It is not, however, in consequence of any attachment to my opinion, that I presumed to address that request to your Lordships; but, considering this to be a case of the greatest importance, one that must establish for the first time, how a Court of Equity will execute such a covenant as this, and in which one party seeks to execute it in direct opposition to decision, it appeared to me extremely important, with [227]

(d) 3 *Bro. C. C.* 101

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reference to the state and condition of that great mass of property, which at this day deserves as much attention as the inheritance, that this cause should undergo so much discussion, that in future it may be known, how such covenants are executed; that conveyancers may understand, what is the effect of such covenants, and of wills, creating executory trusts.

No difference in the execution of an executory trust by will and a covenant in marriage articles.

There is no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles. Such a distinction would shake to their foundation the rules of Equity. The alteration in this decree, that has been suggested, will keep your Lordships clear of many important difficulties, with which you must have been embarrassed, if the Duke of *Newcastle* had not, which I take it to be now admitted, attained the age of 21. But, that this subject may be understood in future, it is fit to examine it with that view

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Settlement of a term for years.

The known practice of conveyancers is much older than *Stanley* v. *Leigh*. (*a*) No point of this kind was determined in that case. The point was, whether, where there is a limitation over of a term for years in default of issue of the first taker, he takes absolutely. Sir *Joseph Jekyll* refers to the known practice of conveyancers, as the medium of proof that the limitation contended for was not too remote. The practice of conveyancers, as there stated, is, that they limited leasehold estates to a person for life, with successive remainders to the first and other sons at 21; if any died under that age, devesting the estate; with a limitation over, if all died under that age. That known law of conveyancers will never suit the purpose of the execution of such a covenant as this; not providing for the case of a son dying, leaving a son; and, the object of these conveyances being to knit the leasehold estate to the freehold, if the son dying left issue to take the freehold estate, the estates would be separated; which ought not to be permitted; the primary object being, that they should go together.

In *Gower* v. *Grosvenor* (*b*) Lord *Hardwicke* decides nothing upon the subject. I will read what his Lordship says; as it is very strong reasoning in support of the execution of a direction, or a covenant, creating a modification and limitation, not as far as the law will permit, but to such an extent, short of that, as will enable you to execute the primary object to keep the estates together, as far as the law will enable you. Lord *Hardwicke* states the practice of conveyancers, and carries it further, according to the report in *Barnardiston*, and according to the known practice of conveyancers, which is adopted in the direction of

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the decree now under consideration, than the passage (*a*) in

(*a*) 2 *P. Will.* 686. (*b*) *Barnard. Cha Rep.* 54.
(*a*) p. 229. 2 *P. Will.* 689.

Stanley v. *Leigh*. Lord *Hardwicke* says, it is the known practice of conveyancing to limit leasehold estate to a tenant for life, then to the son; either to be absolutely vested in him, when he shall attain the age of 21, or upon his birth; to be devested, if he dies under that age; and to go over, but not upon the simple contingency of his death under the age of 21; as Sir *Joseph Jekyll* says; but, if he shall die under the age of 21 without issue, generally; if the object be to limit an estate in tail-general; or, without issue male; if an estate in tail-male be the object.

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But this is not carrying it, as far as the law will permit; for the moment a son comes to the age of 14, he may, subject to the contingency of his death under the age of 21, not leaving issue male, bequeath the leasehold estate. Suppose, he dies under the age of 21, leaving issue male: that issue-male would not take the leasehold estate, as he would the real estate: but the leasehold estate would be part of his general personal estate, which may go to his next of kin, and equally to the wife with them; or, in some parts of the kingdom, the larger portion to the wife. Therefore the proposition, that the leasehold estate is made unalienable, as long as the rules of law will permit, as was said by Sir *Joseph Jekyll* and Lord *Hardwicke*, is not true in any sense: one sense of those words being, that you are to make use of all the modifications and limitations the law will admit, to select those, that will enable you to execute the primary purpose, to knit together the two estates, as long as the law will admit.

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Distinction between a will making a direct gift and a covenant by articles, to be executed; not between a covenant upon consideration of marriage and an executory trust by will.

The decision in this cause goes upon a supposed distinction between marriage articles and wills. There is a distinction; if the will makes a direct gift, and the articles contain a covenant, to be executed. But the distinction between a covenant upon consideration of marriage and an executory trust under a will is new to me. Lord *Hardwicke's* opinion, in two cases upon wills, is directly contrary to that of Lord *Thurlow*, expressly upon the point, that those were not cases of direct gift; but a direction how the property was to be held and enjoyed; under which direction a conveyance or settlement was to be made. Upon such an executory trust the same principle prevails as upon marriage articles.

The limitation in *Gower* v. *Grosvenor* was to the heirs male of the family, according to a manuscript note: the report in *Barnardiston* has the word "successively," which makes no difference. Lord *Hardwicke* says, the question is very considerable, not only in respect of the limitations of personal chattels, but upon the frequency of these clauses in wills and settlements: he thought that clause was clearly a directory clause only; that he would construe it, as far as the words could be applied, agreeable to the law; there

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was no direct gift to any one; but only a direction, how the testator would have those chattels go: they vested in the executor; the property was in him, and to be considered as given to him, to settle in the manner directed by the will.

That I construe, as showing the opinion of Lord *Hardwicke*, that the executors took this property upon a trust, to settle it according to the will. The principal difficulty I have, arises from the contradictory decisions upon this subject. The principle here laid down by Lord *Hardwicke*, appears to me to be the best; and I wish, it had been abided by; and I give your Lordships this trouble, with the view, that the law may hereafter be understood. Lord *Hardwicke* further says, clauses of this nature are common in marriage articles; and it is dangerous to adhere to the limitations of the freehold estate; so as to overturn the express intention; where the intention is, not to constitute a particular limitation, but to leave it to the law.

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That is the case of a will; in which the testator does not take upon himself to say, what the limitations shall be; but expresses his general purpose, leaving it to a Court of Equity to say, in what manner, and by what conveyance, that will be best effected. This being Lord *Hardwicke's* opinion in that case, in another case (*a*) his Lordship is represented to have recognized the ground of his opinion, as to what he said in *Gower* v. *Grosvenor*, (for it is not a decision,) as standing upon this principle, that a will of this sort, which does not give by way of direct gift, but leaves it to the law to frame the conveyance, under which the party is intended to take by a general expression of intention, is to be considered as creating an executory trust.

Executory trust by will.

The next case is *Trafford* v. *Trafford*; (*b*) upon which the first observation is, that I never found any person, or any book, that could inform me, that a Court of Equity ever executed a covenant of this sort by postponing the vesting to the age of 21, except the case of *Trafford* v. *Trafford*; in which the testator himself had expressly said, the property should not vest until that age. Upon that case, which is very material, another observation arises, that I never could displace; forming to it, as an authority, a considerable objection, that has never been answered. The words are, not "issue male," but "such male person." First, that was clearly an executory trust; next, the limitation was expressly, when the party should be 21; and not only that; but it was to a person entitled to the trust in possession. One question was, whether the tenant for life at the age of 21 would take. To that it was answered very satisfactorily, that could not be; as the testa-

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(*a*) *The Duke of Bridgewater* v. *Egerton*, 2 Ves. 121.
(*b*) 3 *Atk.* 347.

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tor, having created interests in the nature of heir-looms in those chattels, must have intended those terms to apply to such persons as would take heir-looms; that is, those, who would take estates of inheritance; and therefore the tenant in tail before the age of 21 would not be entitled to have that property given to him. The report in *Atkyns* is not correct; representing Lord *Hardwicke* to state himself to have decreed in *Gower* v. *Grosvenor*; when no decision of this point was made in that case. But his Lordship is represented to state his opinion, that it amounted to a direction to settle; and in this the report is correct. This seems to have escaped Lord *Hardwicke's* mind. If the limitation had been to such son at the age of 21, as would be entitled to the trust in possession of the real estates, as the son must attain the age of 21 within 21 years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to executory devise. But the words are, "such male person." A son might die during the life of his father under the age of 21, leaving a son, who might not attain the age of 21 for a considerable time, and who also might die under 21, leaving a son; who might be the first person, attaining the age of 21, and entitled to the trust in possession. A considerable question therefore in that case, totally overlooked, was, whether the limitation, taken altogether, was not wholly too remote. Thus it rested until the case of *Foley* v. *Burnell*. (a)

Limits of executory devise, 21 years after lives in being; with the period of gestation.

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It is taken for granted in this case, that the power of revocation attached upon the leasehold, as well as the freehold, estates. That is not so. Upon the settlement that power does not attach upon the leasehold estates. But, which is more material, the deed of 1775 does not affect to execute that power as to the leasehold estates. The Duke of *Newcastle* and Lord *Lincoln*, making the settlement of 1772, go no further as to those estates than the sons of the Earl of *Lincoln*: but there is a covenant by the Duke to settle the leasehold estates to Lord *Lincoln* for life; and, after his decease, for his first and other sons successively. If the decision upon the settlement of 1775, that the property either should vest in the first son, not upon his birth, but at the age of 21, or should devest, if he died under that age without issue-male, as the fact happened, the covenant is gone by the course of events, that have happened; and so much of the leasehold estates, as was not taken out of the Duke, remained in him, to be considered as the subject of the settlement of 1775.

The case of *Foley* v. *Burnell* is extremely important. The Court of Chancery at that time could not furnish a

(a) 1 *Bro. C. C.* 274.

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Effect of a directory clause in a will raising an executory trust; which equity will mould to the purposes of the testator.

case, in which under such a direction as occurred in *Gower* v. *Grosvenor*, (*b*) and *Trafford* v. *Trafford*, (*c*) the limitation had been extended to the age of 21; unless that period was pointed out to them by the testator. * In *Foley* v. *Burnell* there was great discussion upon the words "for "ever;" and with reference to a perpetuity; which the testator was very near: but upon the whole of the words, taken together, that objection did not prevail; and, the clause being directory, which a Court of Equity would mould to the purposes of the testator upon its general principles, there never was a case, in which Lord *Hardwicke's* reasoning might more properly apply; and yet a son, who lived a few weeks, was taken to be *persona designata*, under the words, "who from time to time should respectively "and successively be entitled." This was pressed by very anxious and able arguments upon Lord *Thurlow*; whose opinion was, that, if the testator did not give explicit directions as to his meaning, there was only the choice, either to say, the leasehold estates should vest *eo instanti* the child was born, or to carry the limitation to the utmost extent the law would admit; that the clause in Lord *Foley's* will did not enable the Court to take the latter course, that it would be very inconvenient, for the purpose of annexing the estates together, to carry it to that extent; and, the testator not having pointed out, what was the intermediate modification between the extremes, the Court had no authority to adopt an intermediate modification; and therefore Lord *Thurlow* held the interest vested in the child at his birth.

That cause did not rest there. It was re-heard before the Lord Commissioners; and Lord *Loughborough* reasons upon it as the case of a will directing an executory trust; and says, if I recollect his expression right, that it is impossible from such a hint to pursue these several articles through all the niceties of modification and limitation. The distinction, taken by Lord Commissioner *Ashhurst*, has been noticed by the noble and learned Lord, who spoke

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last; that, where the testator leaves it to the Court to make the conveyance, the Court will protect the property, as far as may be; but that testator had taken upon himself to be his own conveyancer. My answer to that is, the Court may hereafter do that; but they never yet have done it. This decree does not affect to do it, and there is no precedent, that the Court ever did what Lord Commissioner *Ashhurst* supposes. That testator did not take upon him to be his own conveyancer. Upon the authority of Lord *Hardwicke*, and of Lord *Loughborough* in that case he did not; and if the decree, now before your Lordships, is to stand upon those *dicta* of Lord Commissioner *Ashhurst*, it

(*b*) Barnard. Chu. Rep. 54. (*c*) 3 Atk. 347.

stops infinitely short of what those *dicta* require to be done. But that, which Lord Commissioner *Ashhurst* has said, never was directed, except in *Trafford* v. *Trafford*; (*a*) in which case the age of 21 was expressly fixed by the testator; which bound the Court. From the decree of the Lords Commissioners, affirming Lord *Thurlow's* decree, there was an appeal to your Lordships; upon which a question was put to the Judges, whether the creditors of *Edward Foley* could take the chattels in execution: if they could, the property was absolute: otherwise not. The opinion of the majority of the Judges was, that the chattels did vest absolutely; and upon that your Lordships affirmed the decree.

1806.

THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE.

In *Vaughan* v. *Burslem* (*b*) Lord *Thurlow* says distinctly, there was nothing in the circumstance, that the words, "as far as the law will admit," were not in Lord *Foley's* will. The words in *Vaughan* v. *Burslem* were as strong as could be: but Lord *Thurlow* again held, considering himself fortified by the judgment upon the appeal in *Foley* v. *Burnell*, that he could never construe that will, as calling upon him so to modify the personal estate as to tie it up for 22 years; which is as far as the law will admit; and his Lordship marked all that reasoning upon the words, "as "far as the law will admit," &c. by stating, that it was mere pedantry to rely upon it; and held a son upon coming into *esse* absolutely entitled.

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Upon the true result of the authorities I do not think, the principle is, that the property is to be tied up, as long as the law will admit. If it were *res integra*, the best principle according to my opinion would be, that the testator ought to be considered as furnishing the Court with all the means of enabling the party to tie up the property, not as long as the rules of law will admit, but to that convenient extent, which will enable you to execute the general, primary, purpose of the will or settlement, to carry together the real and personal estates. That principle clearly is not executed by this decree.

A great deal of the difficulty is removed by the proposition of the noble and learned Lord, who preceded me; for, if that is adopted, this decree cannot serve as a guide to conveyancers as to what is to be done under any other circumstances than a tenant in tail in possession, attaining the age of 21; and, if a rule is to be adopted, which contradicts former authorities, in so putting the case, his Lordship has adopted the most judicious mode. If I had decided this cause originally, I should have decided it according to *Vaughan* v. *Burslem*. That authority referring to *Foley* v. *Burnell*, and no one being able to state such an

(*a*) 3 *Ath.* 347. (*b*) 3 *Bro. C. C.* 101.

1806.

THE COUNTESS OF LINCOLN v. THE DUKE OF NEWCASTLE.

execution of such a covenant as this, as ever having taken place in practice, I should have thought myself bound. I think at present, that is the better opinion upon that account: for what * has happened in this instance has happened in many: under the authority of *Vaughan* v. *Burslem* and *Foley* v. *Burnell*, assignments have been made of leasehold property, under the notion, that a son, when born, would take the absolute interest; and your Lordships would shake a very large property enjoyed under those cases.

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But, I think, Lord *Hardwicke's* was originally the better doctrine; and under these circumstances, recollecting the opinion of that great Judge, and the opinion of Sir *Joseph Jekyll*, the decision in the Court of Chancery, and knowing the concurrent opinion of both the noble and learned Lords, now present; and, that the opinion of Lord *Thurlow* now is, that this cause, with some such modification as is proposed, will be rightly decided, though I cannot reconcile the principle of this case with the two cases, decided by Lord *Thurlow*, I bow to all the authorities, to which I have referred; and stating, that I am in some degree dissatisfied with the determination, and, that a better decree than even that now proposed might have been made, I will not put any question upon it. I have discussed the case with the hope of making the law better understood in future.

The Lord CHANCELLOR.—I understand the opinion of the noble and learned Lord, who has just sat down, to be, that, if the cases of *Foley* v. *Burnell* and *Vaughan* v. *Burslem* had not been decided, his Lordship's opinion would be, that the decree, as far as we have any thing to do with it, would have been justified. In this cause, as it came before the Court of Chancery, the intention, that these estates should go together, as far as the rules of law would admit, cannot be doubted. The question in the Court of Chancery was, whether the interest in the leasehold estates was absolutely vested, or not. The modification of the decree, now pointed out, is, that the respondent, the Duke of *Newcastle*, should have the absolute interest: the appellants coming to your Lordships' bar, to maintain their own rights; which are negatived by the Court of Chancery, upon principles admitted by the noble and learned Lord who spoke last; and no amendment of the decree in that respect being proposed. Finding it impossible to reconcile all these cases, I think, that, which, it appears to me, would have been the judgment of Lord *Hardwicke*, in *Gower* v. *Grosvenor*, is the best. A Court of Equity should give a construction to an executory covenant of this kind, agreeable to what would have been the direction of a conveyancer, consulted by the party; informed, that he had settled his real estates in strict settlement, and had leasehold estates.

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which he wished to have tied up, as far as the rules of law would admit. If he does not express his intention distinctly, the Court cannot act. If he will be his own conveyancer, and create the estate, the Court has no jurisdiction to alter that estate, so created by the party himself, but upon such a covenant as this the Court has jurisdiction under the authority of *Gower* v *Grosvenor*, and it is reasonable, that the intention shall be executed, when the Court can see it I concur in the modification of the decree pointed out by the noble and learned Lord, who opened the cause, and have no doubt, if it had been suggested immediately after the decree, it would have been adopted

1808.

THE COUNTESS OF LICHFIELD v. THE DUKE OF NEWCASTLE.

Distinction between executed and executory, and the effect

The following order was made by the House of Lords; reciting, that it was admitted by the agents on both sides, that the respondent, the Duke of *Newcastle*, had attained his age of 21 years.

April 19 [239]

"It is ordered and adjudged by the Lords Spiritual and "Temporal, in Parliament assembled, that the said decree, "complained of in the said appeal, be varied, by leaving "out from the word 'assigns,' to the words, 'and it is "ordered,' it being unnecessary from the circumstance of "the respondent *Henry Pelham Pelham Clinton* Duke of "*Newcastle* having attained his age of 21 years to decide "any thing touching the part of the decree, so left out. And "it is further ordered and adjudged, that with this variation the said decree complained of be, and the same is "hereby affirmed."

1806.

AT THE ROLLS.

1805.

Dec. 19, 20. 23.

HILLARY *v.* WALLER.

Upon appeal before The Lord *Chancellor*, 1806, *March* 13, 14.

Reconveyance of the legal estate presumed under obscure circumstances, after a great lapse of time, though the possession originally not adverse, but under a trust. Upon that presumption a specific performance decreed against a purchaser. (1)

THE bill prayed the specific performance of an agreement by the Defendant to purchase a farm and lands called *Fingreth-Hall Farm*. The Defendant objected to the title; which stood on the following circumstances.

By indenture, dated the 27th of *February* 1694, it appeared, that by indentures of lease and release, dated the 22d and 23d of *February* 1664, expressed to be made between Sir *Thomas Piers*, *Thomas Lake*, *John Mildmay* and *Mary*, his wife, Sir *Humphry Mildmay*, *Humphry* and *Anthony Mildmay*, the two younger *sons of Sir *Humphry Mildmay*, of the one part, and *Henry Mildmay* of the other part; reciting a recovery in the 14th year of King *James* the first of the manor of *St. Clere's* and *Heron's*, and other lands in *Essex*, and of the manor of *Fingreth*; and an indenture, dated the 1st of *March* 1653, wherein it was covenanted, that a fine should be levied of the manor of *Bicknacre*, and other lands in *Essex*, to the use of Sir *Gobart Barrington*, and his heirs; and that by indentures, dated the 24th of *March* 1653, between Sir *Humphry Mildmay* and *Robert Johnson*, of the one part, and Sir *Gobart Barrington*, of the other part, the Manors of *St. Clere's* and *Heron's* were conveyed to Sir *Gobart Barrington*, and his heirs; and that by an another indenture, dated the 24th of *March* 1653, between Sir *Gobart Barrington*, of the one part, and Sir *Humphry Mildmay*, of the other part, it was declared, that, if the recovery for so much of the lands, comprised in it, as were contained in the said indenture of the 1st of *March*, 1653, should before the end of three years be reversed, and if Sir *Humphry Mildmay*, or his heirs, should before the end of one year after such reversal, do all acts for the better insuring to the said Sir *Gobart Barrington*, and his heirs, the said Manor of *Bicknacre*, &c. then Sir *Humphry Mildmay* might quietly hold and enjoy the said Manor of *St. Clere's* and *Heron's*: and reciting, that by indentures of lease and release, dated the 21st and 23d of *February* 1664, the release being between Sir *Thomas Piers*, *Thomas Lake*, *John Mildmay* and *Mary*, his

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(1) This decision, says *Mr. Sugden*, (*Vend.* & *Purch.* 2 Amer Ed 250,) certainly has not met with the approbation of the Bar, and has occasioned considerable difficulties in practice. It is cited, however, by Judge *Story*, delivering the opinion of the Supreme Court of the United States in *Prevost* v. *Gratz*, 6 Wheaton, 481, and the doctrine said to "meet their entire approbation" Judge *Washington*, who originally decided the cause differently, as to the point upon which the Supreme Court reversed his decree, was absent. His opinion will be found, 1 Peters' Rep. 364. See also, *Ham* v. *Schuyler et al* 4 Johns. Cha Rep. 1, where it is cited & recognized as authority.

wife, Sir *Humphry Mildmay*, and *Anthony Mildmay*, of the one part, and *Philip Gurdon*, and *Anthony Knightsbridge*, of the other part, the Manor of *St. Clere's* and *Heron's* was conveyed to *Philip Gurdon* and *Anthony Knightsbridge*, and their heirs, the said Manor of *Fingreth* and *Fingreth-Hall Farm*, were granted and released to the use of *Henry Mildmay*, his heirs and assigns; and it was declared, that the said *Henry Mildmay*, and his heirs, should stand seised of the said Manor and farm, subject to the several trusts therein after expressed: *viz.* subject to the payment of two Annuities, of 200*l.*, to Sir *Humphry Mildmay*, and 80*l.* to Lady *Jane Catharine*, his wife, as a collateral security to *Gurdon* and *Knightsbridge*, their heirs and assigns, for the title of the said manor of *St. Clere's* and *Heron's*, and the lands and premises, intended to be conveyed to *Gurdon* and *Knightsbridge*, their heirs and assigns, by the said indenture of the 22d of *February* 1664, and for quiet enjoyment, free from encumbrances, &c. other than the said Annuities; and further, until *Gurdon* and *Knightsbridge*, their heirs, &c. should be ejected by reason of any legal title, charge, &c. preceding the said conveyance, out of the said manor of *St. Clere's* and *Heron's*, &c. and the aforesaid trusts being satisfied, and *Gurdon* and *Knightsbridge* so collaterally secured, upon trust to permit the said *Mary Mildmay* to receive the rents of the said premises during her life; and after her decease to permit the said *John Mildmay* to receive the said rents; and after his decease in trust for such person and persons, estates, &c. as the said *John* and *Mary*, by writing, with two witnesses, or he surviving, should by will appoint; and also upon further trust, that, in case there be no legal eviction of *Gurdon* and *Knightsbridge* out of the said manor of *St. Clere's* and *Heron's*, &c. before the expiration of 11 years next after the deaths of Sir *Humphry Mildmay* and *John Mildmay*; or, in case there be such eviction, if *Henry Mildmay*, his heirs, &c. should not be evicted out of the lands, so granted, &c. then *Henry Mildmay*, his heirs and assigns, shall convey to the said *Mary* for her life, and after her decease, or in case of her decease before, to such person, &c. for such estate, &c. as said *John* and *Mary*, or *John*, after her decease, should appoint one full moiety of the Manor of *Fingreth-Hall*, &c. thereby conveyed to *Henry Mildmay*, and his heirs, free from incumbrances; and lastly, it was declared, that the assurance thereby made, of *Fingreth-Hall Farm*, and lands, to *Henry Mildmay*, and his heirs, was so made only for collateral security to *Gurdon* and *Knightsbridge*, their heirs, &c. of the title of the said Manor of *St. Clere's* and *Heron's*, &c.

1696. HILLARY v. WALLER. [241] [242]

By indentures, dated the 27th of *February* 1694, being a settlement made on the marriage of *Elizabeth Cory*, daugh-

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HILLARY v. WALLER.

ter of *John Cory* and *Mary*, his wife, late *Mary Mildmay*, with *William Hitch*, and also a deed of revocation of subsisting trusts, and an appointment of fresh trusts, with a covenant to levy a fine, of the Manor, farm, and lands, at *Fingreth*, &c. it was covenanted, that the said Manor of *Fingreth*, and other premises, were free from incumbrances, except a lease and rent charge, since expired, or except a conveyance of the whole premises to *Henry Mildmay*, and his heirs, as a collateral security to indemnify him, his heirs, and assigns, from any incumbrance upon the Manor and premises, purchased by him, or his trustees of *John* and *Mary Mildmay*, and their trustees.

In the year 1737 the tenant for life, under the settlement of 1694, and the coheirs of the survivor of the five trustees, granted a lease of the lands in *Fingreth*; the settlement containing a provision for that purpose.

In the year 1750 the tenant for life and tenant in tail under the settlement of 1694 suffered a recovery. It appeared upon the deed of 1694, that Lady *Jane Catherine Mildmay* was then living.

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The objection to this title, taken by the answer, was founded upon the indenture of the 23d of *February* 1664; which is excepted in the covenant against incumbrances in the indenture of settlement of the 27th *February* 1694. The Defendant admitted, that the original or counter-part of the said indenture was in the possession of the Plaintiffs: that the Plaintiffs, or the persons, from whom they claim, have been in possession of the premises for 140 years; and that the Manor of *St. Clere's* and *Heron's* is vested in trustees upon the trusts of two family settlements; and that, if the legal estate in fee-simple of the Manor and farm of *Fingreth* is outstanding, it cannot now be got in; and he insists, that under all the circumstances, the legal estate must still be considered as outstanding upon the trusts of the said indenture of the 23d *February* 1664.

The deed of the 23d of *February* 1664 was produced from the possession of the Plaintiffs. It appeared to have been executed by only three parties, and there were but three seals. Two of these were clearly conveying parties. The third signature was "*H. Mildmay*;" which the Plaintiffs insisted was the signature of *Humphrey Mildmay*, another of the conveying parties; using their possession of the original deed as evidence, that there had been a reconveyance: the Defendant suggesting, that this might be the signature of *Henry Mildmay*: that the deed produced might therefore have been intended as a counter-part; or both parts might have been originals; and in either case no inference could be drawn from the possession of that instrument by the Plaintiffs.

1806.

HILLARY v. WALLER.

Mr. Romilly, and Mr. Shadwell, jun. for the Plaintiffs.— Under the circumstances there is no objection to this title: an estate conveyed for 110 years, as if the persons entitled were seised of the legal estate; no mention of any incumbrance or charge, or of the legal estate being outstanding. The deed, by which the reconveyance of the legal estate was made, certainly is not to be found. Thence it is contended, that the legal estate is outstanding; and therefore there is only an equitable fee. The objection is not, that any beneficial interest can be set up in any person. A conveyance is under these circumstances to be presumed in any Court, though not now to be produced. The legal estate was vested in a trustee for a certain purpose; and, when that was answered, a trust resulted for the Plaintiffs, and those, under whom they claim. No demand has been set up: nor has the estate been resorted to, in respect of this indemnity. It is clear now, no incumbrance can be set up against these estates. The indemnity has not been insisted upon for 140 years. The Plaintiffs are in possession of the deed creating the indemnity; which they ought not to be, upon the supposition that it is not at an end. There is no trace of any claim in respect of it. It does not appear certainly, in whom the legal estate was at the time that deed was executed. The purport of that deed is, that the legal estate was in all these persons: not a conveyance by some, and a confirmation by others. It is certainly a very irregular deed. There is no trace, subsequent to 1694, that the legal estate was outstanding in any one. It is to be presumed, that it was conveyed to the person to whom it ought to have been conveyed.

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The cases of presumption have gone a great length: *The Mayor of Kingston upon Hull* v. *Horner*: (*a*) and the case there stated, of a grant of the crown presumed; and *Powell* v. *Milbanke*, (*b*) in the note. There is no case very like this: but in many instances the Court proceeds upon the presumption of the existence of instruments, that do not actually exist: as a release of the equity of redemption upon 20 years possession by a mortgagee: so, where no interest has been paid upon a mortgage for a great length of time, unless there are other circumstances, a release by the mortgagee is presumed. Certainly more than 20 years are necessary. If the Court cannot presume this conveyance after 110 years, there can be no more reason to presume it after 500. *Spelling* v. *Trevor*, (*c*) and other cases, have established presumptions upon less time. *Doe* v. *Prosser* (*d*) was a presumption of actual ouster by one tenant in common of another upon uninterrupted possession for 36 years

(*a*) Comp. 102. (*b*) Comp. 103 *ante*, vol. vi. 673.
(*c*) *Ante*, vol. vii. 497. (*d*) Comp. 217.

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Mr. Richards, and Mr. Hoare, for the Defendant.—There is no ground upon these circumstances to presume a re-conveyance. Presumption is a question of fact, upon circumstances. The legal estate is shown to have been outstanding in 1694. The question is, whether there is evidence, upon which a jury could upon their oaths say, they believe there has been a re-conveyance; and the judge in this Court is upon this question acting in the province of a jury. If that cannot be said, the legal estate must be taken to be still outstanding: the length of time making no difference. If
[246] there was a draft, or any thing of that nature, to support the presumption, a jury, or this Court, would be justified in making it. In many cases the nature of the enjoyment would entitle the party to believe there was a re-conveyance. If there was an outstanding term in mortgage 150 years ago, and the mortgage instrument was found among the family deeds, a re-assignment of the term may fairly be presumed. But where the enjoyment is perfectly consistent with the outstanding legal estate, there is not the same ground. In the case, cited from *Cowper*, the party was in the actual enjoyment of the tolls for 2 or 300 years; from which the right must be inferred.

Admitting a trust, when the purpose is gone, it does not follow, that the estate was re-conveyed. It is uncertain, whether one of the persons executing is the grantee, or a granting party: if the former, this instrument may have been the counter-part; or both parts may have been originals; and nothing can arise upon the Plaintiff's possession of it. But this instrument, being executed only by some of the granting parties, cannot be the original. Besides, in the settlement of 1694 this is excepted in the covenant against incumbrances; which shows they considered the deed an operative deed. The exception of it is as of a good conveyance.

There is no evidence of a re-conveyance, except what arises by way of presumption from length of time. It is clear the trustee in the settlement of 1694 had not the legal estate in him: the conveyance being excepted, which carried the legal estate. It was outstanding therefore in 1694. The deed of 1737 is a lease, in which the heir of the surviving trustee in the deed of 1694 was a party. But it does not follow, that he had the legal estate in him any more than
[247] that his ancestor had. The only evidence of any transaction between the parties is confined to that lease. A lessee never looks into the title of his landlord, but takes what title he can get, and is content with that. (*a*)

There is no trace of the legal estate having been re-conveyed. A recovery was suffered in 1750: no person, a par-

(*a*) See *White v. Palmer*, *ante*, vol. xi. 387.

ty to the deed, leading the uses of that recovery, representing the person, who had the legal estate under the conveyance, excepted in the covenant against incumbrances in the settlement of 1694: no draft, abstract, or any thing, that can lead to a supposition of a re-conveyance. There is no attorney's bill, &c. nothing of any sort till the lease in 1737. The Court is desired to infer, that the legal estate was in the heir of the surviving trustee then; as he was a party to that lease: it being clear, it was not in his ancestor. He might have been required to join upon other grounds. There might, for instance, have been a power to let, with consent of the trustees. Beyond that, there is nothing but length of time to induce the Court to believe, there was a re-conveyance. That can never be presumed, where the possession and enjoyment are consistent with the legal estate outstanding in another. The deed of indemnity of 1664 was to secure possession and enjoyment for 11 years after the lives of the parties in that deed, as to one moiety of the estate, as to the other moiety nothing is said. There is no purpose, upon the execution of which this legal estate was to be at an end, and to be re-conveyed: but it is given generally as a security for the title for any length of time. The enjoyment was with the *cestuy que trusts*. There was no necessity to perfect their enjoyment, or title, to call for a re-conveyance of the legal estate. The indemnity might become nugatory at the end of 60 years: but it does not follow, that the legal estate was to be re-conveyed. Suppose an estate tail; a base fee acquired by a fine; and the parties claiming under that base fee in possession till the extinction of that line: there is no doubt of the right of the remainder-man to recover. There has been an instance, at *Chester*, of such a recovery at the end of 90 or 100 years. If there is no valid recovery, though the fine, by which the base fee is acquired, bars the issue, the remainder is not displaced; and, if the remainder is in the crown, it can never be barred. It is possible therefore, that there may be occasion to call for the use of the indemnity.

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But suppose we are satisfied, that the estate, which is the subject of the indemnity, is such, that the owner cannot be disturbed, what then is there to call upon the Court to presume a re-conveyance by the trustee? When was he to be called upon to re-convey: when is it to be supposed he was not to be called upon? Never: unless the persons for whom he is a trustee, will join in directing him to convey. But that does not at all appear in the transactions of this family. There is therefore every reason to presume, that he never did re-convey. But it is not necessary to raise that presumption: the legal estate outstanding, and the enjoyment perfectly consistent with that: no act shown, in which it was necessary to have such re-conveyance, and a possible case

1806. HILLARY v. WALLER.

being shown, in which there may now be occasion for the indemnity. The legal estate appearing to be out, they ought to show it was got in. What is thrown out upon presumption by the Lord *Chancellor*, in *Harmood* v. *Oglander*, (a) and has been * said in other cases, is applicable, where the enjoyment is inconsistent with the estate outstanding. There the Court directs the jury to presume, what is very difficult to presume, a grant. Where the enjoyment goes a great way back, the Court, or a jury, make the presumption: as an endowment upon enjoyment of tithes: a right of way, &c. that is, as it cannot be supposed, the enjoyment would have been permitted for 30 years without interruption by the persons having the right to the rest of the field: amounting to evidence of some strong obligation not to prevent it. It is very different, when the enjoyment is perfectly consistent with the outstanding legal estate. The question is, whether the Court are bound to say, upon their oath, there is reason to believe there was a re-conveyance. It is not to be presumed, that the legal estate is brought in, merely as it is very inconvenient with respect to title to suppose it outstanding. That is not the question. There is not a trace of any dealing for the legal estate in this family.

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Mr Romilly, in Reply.—It is clear upon the deed, the defect that might possibly be in the title to these estates, was one, that must be settled in a very short time; in the life of *John Mildmay*, or eleven years after his death. The only question is, whether the circumstance of the legal estate not being re-conveyed is any objection. This question was never put upon such grounds. There must be an end of all presumptions, if the Court is to say, as a jury, upon their oath, they believe the legal estate was re-conveyed. All these are questions of great obscurity; and the jury must decide between the probabilities. They cannot say upon their oath they believe either way. They can only say, it is very improbable the legal estate should be left a great length of time outstanding, for no purpose whatsoever, by the persons entitled to it; and that it is very inconvenient to suppose it; but not, that they believe it was re-conveyed. The legal estate in fee is never left outstanding, as a term is, to protect against incumbrances. The mere circumstance, that the parties are entitled to call for a re-conveyance, is a ground for the presumption. But there is a great deal more here. The Plaintiffs have a deed, which they ought not to have, if there has not been a re-conveyance. This deed was executed by two of the grantors unquestionably; and the signature of "*H. Mildmay*," may be either *Humphry* or *Henry*: but the one case is liable to the objection of great improbability: a counter-part, executed by

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(a) *Ante*, vol. viii. 106.

two of the grantors and the grantee. It is impossible to account for the co-heirs of the surviving trustee being called upon to join in the lease, unless the legal estate was in them. Though it is true, a lessee in general does not enquire into the title of his lessor, (a) no honest lessor will grant a lease without taking care that the lessee has the estate. It is impossible for the purchaser to suggest any difficulty hereafter from this supposed legal estate being set up. It is admitted, there never can be a re-conveyance of the legal estate. That shows he can never be disturbed; if it is outstanding. In five years it will not be necessary to go back further than 1750.

1806. HILLIARD v. WALLER.

The MASTER *of the* ROLLS.—The question is, whether a re-conveyance of the legal estate ought under the circumstances of the case to be presumed. If it ought, then it is not an equitable, but a legal title, that the Defendant is desired to take. I agree, that length of time does not by itself furnish the same sort of presumption in this case, that it does in a case of adverse possession. Long continued possession implies title; as, if there were a different right, the probability is, that it would have been asserted. But undisturbed enjoyment does not show, whether the title be equitable or legal. It does not follow, however, that a conveyance of the legal estate cannot be the subject of presumption; though the presumption is made upon a different ground.

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Lord *Kenyon*, though disinclined to permit ejectments to be maintained upon equitable titles, always admitted, that it might be left to the jury to presume a conveyance of the legal estate; and so far acceded to Lord *Mansfield's* doctrine, in *Lade* v. *Holford*; (a) although dissenting from that of some other cases; in which a legal estate, clearly outstanding, was held to be no impediment to a recovery at law by the party beneficially entitled. (b) On what ground was such presumption to be made? On this; that what

Notwithstanding the rule, according to the late authorities that a legal estate, clearly outstanding, prevents an ejectment, it may be left to the jury to presume a conveyance of the legal estate.

(a) See *White* v. *Foljambe*, *ante*, vol. xi. 337.

(a) p. 251 *Bull. N. P.* p. 110

(b) See *Doe* on the demise of *Bristowe* v. *Pegge*, 1 *Term Rep.* 758. *Note*. *Doe* on the demise of *Hodsden* v. *Staple*, 2 *Term Rep.* 684. *Goodtitle* v. *Jones*, 7 *Term Rep.* 1. *Doe* on the demise of *Da Costa* v. *Wharton*, 8 *Term Rep.* 2 and the judgment in *Evans* v. *Bicknell*, *ante*, vol. vi. 174

The course of authority upon this subject, since the time of Lord *Mansfield*, has a strict regard to the original nature of the action of ejectment. The effect however is to limit the general use of that action, as the means of trying title; to which purpose it was by a series of legal fiction anxiously adapted, and for a long period applied. According to the case of *Da Costa* v. *Wharton*, for instance, a creditor by judgment cannot in that way have the benefit of his judgment by *Elegit*, if there is a common lease for 21 years, prior in date to his judgment; though declaring only to receive the rents, not to affect the interest of the tenant.

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ought to have been done should be presumed to have been done. *When the purpose is answered for which the legal estate was conveyed, it ought to be re-conveyed.

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Presumptions do not always on a belief, that the thing has actually taken place.

Presumptions do not always proceed on a belief, that the thing presumed has actually taken place. Grants are frequently presumed, as Lord *Mansfield* says, (*a*) merely for the purpose, and from a principle, of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must for ever remain imperfect, and in many respects unavailable; when from length of time it has become impossible to discover, in whom the legal estate (if outstanding) is actually vested.

Grants presumed upon the principle of quieting possession.

If we could in this case ascertain, at what period the legal estate ought to have been re-conveyed, I see no reason why the presumption of its being re-conveyed at that period should not be made. The difficulty here is, that by the deed of 1664 it is only as to a moiety of the estate, that any time is limited for the re-conveyance. It could not, however, be meant, that the legal estate in any part should continue outstanding for ever. The conveyance of it was made for a purpose that must have some limit. It was by way of security against the eviction of the *St. Clere*'s estate. At what precise moment the danger of eviction ceased, it is impossible to say. But, if the time that has elapsed without claim, 140 years, does not furnish the inference, that none can be made, I do not know, what period would be sufficient for that purpose. Mere possibilities ought not to be regarded. The Court, as Lord *Hardwicke* says, in the case of *Lyddall* v. *Weston*, (*b*) "must govern itself by a moral certainty; for "it is impossible *in the nature of things there should be a "mathematical certainty of a good title." He adds, "There "are often suggestions of old entails; and often doubts, what "issue persons have left; whether more or fewer; and yet "these were never allowed to be objections of that force as "to overturn a title to an estate."

The Court must govern itself by a moral certainty upon title; for it is impossible there should be a mathematical certainty.

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So we have here suggestions of possible grounds of claim. But no man can believe that the owners of the *St. Clere*'s estate feel any apprehension of eviction by title, existing prior to 1664; or, that they would at any time during the last 60 years, have had the least objection to direct a re-conveyance of the *Tingreth-Hall* estate, if the persons in whom the legal interest is vested could have been discovered. Why then should not such re-conveyance be presumed?

As to particular circumstances, from which it is contended, that an actual re-conveyance may be inferred, there are none of very conclusive effect: yet perhaps they ought not to be left wholly unnoticed.

(*a*) Cowp. 215. *Eldridge* v. *Knott*. (*b*) 2 Atk. 19.

1st. The part of the deed of 1664, which is now produced, appears in an ambiguous form. It cannot, it is said, be an original, because it is executed only by some of the grantors; and there were several grantors. Yet, on the other hand, it is said, that if it were the counter-part, it would have been prepared for execution either by the grantee alone, or by all the parties to the deed: whereas here there are places for three seals, and there were three conveying parties. Hence the Plaintiffs infer, that the *H. Mildmay*, who subscribes, is *Humphry Mildmay*, one of the grantors, and not *Henry Mildmay*, the grantee, and the possession of this part is therefore alleged to be some evidence of a re-conveyance of the estate. 1806. HILLARY v. WALLER. [254]

2dly. By the deed of 1694, it appears, that care was taken to refer to that of 1664, as being then a subsisting conveyance of the legal estate. This shows that it was conceived to be proper even in a mere family settlement, as this was, to take notice of the contingent charge, to which the estate might be liable. No reference to the deed of indemnity is found to have been afterwards made; and, it is said, that a re-conveyance was probably made at some time between 1691 and 1737; for in this last year a lease was made, in which the co-heirs of the surviving trustee in the settlement of 1694 were made to join; which, say the Plaintiffs, must have been for the purpose of giving the lessee a legal interest in the term. If that were the purpose, it would show that the legal estate was understood to have been in the trustees; which it could only be by means of a re-conveyance. It is suggested on the other side, that there were other purposes, for which the joining of the trustees in the lease might have been required; and such, no doubt, there may have been; though nothing has been pointed out in the deed of 1694 to show, that there actually were.

The evidence of actual re-conveyance must however be admitted to be slight and inconclusive. But on the general grounds I have before stated, I conceive that there is no Court, before which a question concerning this title can come, that would not under all the circumstances of the case itself presume, or direct a jury to presume, that the legal estate has been re-conveyed. It is therefore such a title as a purchaser may safely take; and the Defendant ought consequently specifically to perform his agreement. [255]

A specific performance of the agreement was decreed accordingly. From that decree the Defendant appealed to *The Lord* CHANCELLOR.

Mr. Richards, and Mr. Hoare, in support of the Appeal.— 1806.

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1694, the Defendant contends there is not a legal title. Under the deed of 1664, notwithstanding the conveyance, *John* and *Mary Mildmay* were entitled to possession until eviction; and the moiety was to be conveyed back, if there was no eviction within 11 years after the death of Sir *Humphry* and *John Mildmay*. Probably it was thought, the risk would be considerably diminished by that time. The other moiety is never to be re-conveyed. No time is limited for a re-conveyance. The question is, whether your Lordship is to presume, that a trustee has been guilty of a breach of trust, by re-conveying the legal estate. There is not the least evidence of any actual re-conveyance. There is a very material proviso in the settlement of 1694; that the said trustees, and the survivor, and the heirs of the survivor, shall make and execute any lease in possession, not exceeding 21 years, &c. as the tenants for life shall think fit. As to the deed in their hands, it is very difficult to say whether it is an original or a counter-part. It will be contended upon that, not only, that the trust is satisfied, but that there has been a re-conveyance. If it is a counter-part, it proves nothing, for the counter-part of a mortgage may be
[256] kept in the hands of the mortgagor, &c. If it was an original, it was absolutely necessary for the person who had the estate in him to have it executed by all the parties. In practice it is as frequent to make all originals as originals and counter-parts; and all parts are executed by all the parties: very frequently, for instance, the *cestuy que trust* has executed the deed in his own hands, as well as the trustee, to whom he conveys the estate. But, whichever it is, it proves nothing; for it does not appear when that deed came into the family. There is no trace of any Solicitor's bill of costs for preparing a re-conveyance, or any entry for that purpose, &c. As to the lease in 1737, the heir of the surviving trustee in the settlement of 1694 being a party, and the inference, that he would not have been a party, unless he had the legal estate, the terms of the settlement by the proviso require the lease to be made and confirmed by the heir of the surviving trustee. The lease therefore would not have been good without his joining; which puts an end to the inference; the only ground for presuming, that there was a re-conveyance in fact.

The question then is, whether the length of time calls for a presumption of re-conveyance: otherwise the estate is admitted to be outstanding, and there is an end of the title. Mere length of time does not furnish decisive evidence. It is only a circumstance. The possession cannot weigh; for since 1694, the possession has gone according to the right of the parties. It proves only, that there has been no disturbance as to the Manor of *St. Clere's* and *Heron's*. The Courts have gone very far in supposing conveyances by way

of presumption; but that has been, where the possession has been such, that it must necessarily import a good title to the possession, as holding adversely to the crown a great length of time; the case of *Chester-Le-Street*, &c.: * cases of possession adverse to the claim. It has been said, an Act of Parliament may be presumed; whether that is wise or not, may be questionable; but it must be, where it is adverse to the claim set up. But here, by the terms of the contract, the possession was to be with the persons to whom the conveyance was made in 1694. Nothing therefore arises from the length of time in this case. 1806. HILLARY v. WALLER. [* 257]

It can never be presumed, that the trustee has been guilty of a breach of trust. The instant the estate was put in *Henry Mildmay*, for *Gurdon* and *Knightsbridge*, he was a trustee for them, bound to protect the estate for them. The Court presumes, that is done, which ought be done; but never, that an act is done, which it is clear, in Law and Equity, ought not to have been done. He was bound to protect the estate to the whole extent of the interest given to them. Is it to be supposed, that no objection lies to the title of *Gurdon* and *Knightsbridge* on account of the length of time? Suppose a recovery ill suffered, or no attempt to suffer a recovery. If 150 years hence the fact could be proved, that there was only a base fee, what right has the Court to say, their title may not be of that description? At least the Court will not say so without giving them the opportunity of giving up the indemnity they thought fit to take. Suppose a remainder limited to the crown * *Gurdon* and *Knightsbridge* have a right to be asked, whether they are satisfied, that there is no reversion in the crown; that the recoveries were well suffered, &c. and that they have a clear estate in fee-simple. At what period of time is the Court to suppose, these trusts for the benefit of *Gurdon* and *Knightsbridge* were completely discharged? Where is the evidence to show the legal estate was brought in? Many legal estates are outstanding of much more ancient date: as old, and older, than the time of Queen *Elizabeth*. There is not mathematical certainty upon title: but the Court ought to have all the moral certainty they can. Here the Court cannot see even with probability. There is no evidence. The outstanding legal estate is consistent with the possession. *Gurdon* and *Knightsbridge* not having signified their consent to give up the indemnity, and there being a possibility that their title may be disturbed, it is to be presumed still outstanding. In the case of tithes many things may account for the non-perception of tithes. The indemnity must be by an estate in fee simple; and the Court would not compel the trustee to convey, without the consent of the party entitled to be discharged from the tithes. In *England*, on the demise of *Syburn* v. *Slade*, (a) and *Doe*, on the [258]

(a) 4 Term Rep. 682.

1806. demise of *Bowerman* v. *Sybourn*, (*b*) Lord *Kenyon* left it to the jury to presume a conveyance from the trustee, when at a given time it was his duty to convey. Those cases may govern the decision here as to a moiety. It is clear from that circumstance, that there was to be no given period as to re-conveying the other moiety. Lord *Kenyon* always thought the legal estate must prevail in ejectment; but, where it was the duty of the person to re-convey, he would allow a presumption of a re-conveyance.

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As to the question of presumption, Lord *Eldon* conceived, the directions to juries had gone quite far enough. We contended at the Rolls, that to support presumption there must be belief: not meaning, that it must be such belief, as if it was seen executed; but upon evidence, that the estate is outstanding, and ought to have been conveyed, and the conveyance is not to be found, it is something very near belief.

[259] It is clear Lord *Eldon* thought, (*a*) that, as between purchasers, the leaning ought to be against the presumption of the assignment of a term, when it was outstanding; though known to be satisfied. Here there is no satisfaction, and no dealing upon it; which, Lord *Eldon* says, there ought to be.

The Solicitor-General, and Mr. Shadwell, jun. in support of the Decree.—This is a question of very great importance; for if after such a length of time the Court will not presume a conveyance, it cannot be presumed at the distance of one, two, or three centuries, or any the most distant period; and the effect would be to make property to a very great extent unalienable; for there can be no alienation: at least only to a willing purchaser. As to the deed of 1664, some things, which were not pointed out at the Rolls, will put the case in a much more clear point of view than it appeared there; and the exact point of time, at which the trustees ought to have conveyed can be pointed out. The difficulty *The Master of the Rolls* had, was, that he could not find that point; and bring it within Lord *Kenyon's* rule. The trusts of the deed are of two kinds: one to secure the two Annuities: the other to indemnify *Gurdon* and *Knightsbridge*, who, it is to be observed, were trustees for *Henry Mildmay* himself, against any incumbrance or claim. It is clear upon the whole deed, the parties conceived the incumbrances, or charges, upon *St. Clere's* and *Heron's* must appear in a short period, that all that was necessary, was to give security for 11 years; and that it was with reference to the other object only, which, depending upon two lives, must be an

[260] indefinite period, that they did not fix the period. It was clear, the indemnity against the former in all probability must be made available within 11 years after the deaths of

(*b*) 7 *Term Rep.* 2. (*a*) See *ante*, vol. VI. 185.

Sir *Humphry* and *John Mildmay*. For the other purpose, securing the Annuities, it was conceived one moiety would be quite sufficient. The deed ought to have provided for a re-conveyance upon the death of the Annuitants. But the deed is very extraordinary in its provisions, and in the manner in which it is executed. There are seven grantors, and only three appear to have executed, and three only were intended to execute; for there are only three seals. Upon what other hypothesis can the particular frame of this deed be accounted for? This is much fortified by the deed of 1694: the whole legal estate then existing in *Henry Mildmay*. A circumstance appears upon the face of the deed of 1694, that shows, the trust with regard to the Annuities had not been accomplished. It appears by that deed, that though Sir *Humphry Mildmay* was dead, Lady *Catherine Mildmay*, the other Annuitant, was living. She could not be expected to live much longer. Therefore it was to be expected, that in a few years more they would have a right to call for a conveyance of the whole, and that accounts for the legal estate being then outstanding, and it shows, the legal estate was an object to them; for it is noticed as then outstanding. Then at the moment of the death of Lady *Catherine Mildmay* the time had arrived when the trustee ought, and could have been compelled in this Court, to re-convey. The period of her death is not precisely known: but it must have taken place soon afterwards. The Court has therefore a period of near a century, in which the re-conveyance ought to have been made; and will presume that it was made at some time within that period. It is true, neither the tenant for life, nor the tenant in tail had a right to call for a limitation of the fee to him; there being no person absolutely entitled to the fee: but they had a right to call for a conveyance to all the uses; and the circumstance, that the fee was split, cannot make a difference.

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From the length of time, then, during which this ought to have been done, it will be presumed that it was done. How is it to be shown that there is no objection to the title of *Gurdon* and *Knightsbridge*? There cannot be negative proof. Mere possibilities are supposed. The Court never proceeds upon such grounds. Unless the objection is shown, it is presumed there is no objection.

As to the distinction upon adverse possession in the cases cited, there are many instances of raising the presumption, where nothing has been done; upon the non-appearance, for instance, of a man, upon whose life a remainder depends, not having been heard of for a length of time: the presumption is raised upon the mere non-appearance, and the Legislature, with respect to leases for lives, has enacted, that if the *cestuy qui vie* has not been heard of for seven years, that shall be evidence of his death. In other cases

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it goes to the jury, and the presumption is raised upon the same principle. In *Doe* v. *Prosser* (*a*) the presumption was raised from nothing being done; mere uninterrupted possession by one tenant in common for 36 years, without any thing of ouster in fact or law: yet an actual ouster was presumed. Therefore, from mere length of time, during which a thing ought to have been done, it must be presumed. Consider the situation of persons whose estates are in trustees. The greater the length of time, the greater the difficulty. If it is necessary to get a conveyance from the heir of this trustee, we must find, who was the heir in 1664. The lapse of time, instead of affording security, increases the difficulty. But the Plaintiffs are in possession of the deed, which conveyed the estate to *Henry Mildmay*. How should that be, unless the estate was re-conveyed: otherwise he or his heirs ought to have that deed. It is said, there is some doubt, upon the circumstance that there are seven grantors; and *H. Mildmay* may be presumed to be *Henry*; and therefore this is a counterpart, put into the hands of the grantors. It would be an extraordinary counterpart: executed by the grantee and two of the grantors. For what purpose should a counterpart of such a deed be executed? There were no covenants. That would be presuming for the purpose of resisting the presumption that ought to be made in support of this title.

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The case before Lord *Ellesmere*, (*a*) that has been referred to by your Lordship, and the case immediately preceding that, *Crimes* v. *Smyth* (*b*) and *Luddall* v. *Weston* (*c*) contradict the position, that there is no presumption from mere length of time. Such a presumption is raised even against the crown. It has been held, that a man, not having been heard of since 1774, a fair presumption arose that he was dead, in support of a title. The Statute 1 *Jac.* 1. c. 11, and other Statutes, are legislative recognitions of length of time as evidence. In *Sperling* v. *Trevor*, (*d*) Lord *Eldon's* opinion was, that as there was no particular ground for presuming that a deed or will was made, that presumption should not be raised. Can the monstrous proposition, that possession for 1000 years shall not afford a presumption in favour of a title, be stated?

Mr. Richards, in Reply.—In forcing a purchaser to take a title, the doctrine as to satisfied terms is a very material ingredient. It should be very clear, that there are no *mesne* incumbrancers; who may get in the estate from the trustee: whereas, if this purchaser gets it in, he will protect himself from all prior incumbrances. The purchaser is placed in that situation, unless the Court has, not mathematical, but moral, certainty, that the estate has been reconveyed. In the case of a purchaser the argument upon

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(*a*) *Comp.* 217.
(*b*) 12 *Rep.* 4.
(*a*) p. 262 *Bedle* v. *Beard*, 12 *Rep.* 4.
(*c*) 2 *Atk.* 19
(*d*) *Ante*, vol. xii. 107

that is very strong against the presumption. *Sperling* v. *Trevor* is not strictly applicable. There was no reason for presuming, that the estate had been disposed of by the ancestor. It was proved, he did attempt to dispose of it by a will, not properly attested; whence a clear presumption arose, that he had not disposed of it in any other way. A declaration against this title will not affect the title of *St. Clere's* and *Heron's*, which is not before the Court. The assertion is, not that there is any infirmity in that title; but merely, that there is no presumption of a re-conveyance of this estate.

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As to the point, whether this is an original or a counterpart, there may be two originals, and some of the grantors have executed this. That is quite uncertain. However absurd that deed, there is no doubt, that the whole fee was once in *Henry Mildmay*; and, unless it can be shown, either by actual conveyance, or presumption, that the fee is out of him, it must be still in him. Then as to the argument upon the provision with respect to the period of 11 years for the re-conveyance of one moiety, the presumption of a re-conveyance may be admitted, if there was any certain time, at which there was a right to call for a re-conveyance, in many, but not in all, cases. That presumption is made, in the case of the ejectment, to promote justice, and prevent injustice, founded in form. But in the case of purchasers and mortgagees the question of presumption does not arise: else it would be impossible to permit a subsequent incumbrance to shut out a *mesne* incumbrancer. Except on the ground of length of time, the Court cannot presume a re-conveyance against a purchaser: no re-conveyance in fact appearing; but the legal estate in fact outstanding. That presumption must proceed upon the ground, that it is possible the re-conveyance was made.

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There is nothing in this deed making a re-conveyance imperative upon the trustee, except as to one moiety. How can it be stated, that the other moiety is left to him to secure the Annuities? There is not a word, showing such a purpose. Nothing is said as to the other moiety. It necessarily continues in him; unless your Lordship introduces words not in the contemplation of the parties. The deed is a complete conveyance to him. No such intention can be collected. In 1694, after the death of Sir *Humphry* and *John Mildmay*, the family treat whatever estate was in *Henry Mildmay*, not in that point of view, but as a collateral security to indemnify the purchaser of the other estate. There is no evidence, upon which in fair construction he can be said to have ceased to be a trustee for that indemnity; and if a given time cannot be pointed out, at which the trustee could be called upon to convey, there is an end of

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their construction; and then the owner of *St. Clere's* and *Heron's* is to be consulted.

The Lord CHANCELLOR.—I admit, a purchaser ought not to be compelled specifically to perform the contract, unless the vendor is in a condition to make a good title; and in a clear and full sense such as ought to be considered by a Court of Justice a good title. The question, whether under all the circumstances I ought to consider this a good title, is of very great importance; and ought to be decided upon principles clear and satisfactory. The presumption in Courts of Law from length of time stands upon a clear principle; built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this; that a man will naturally enjoy what belongs to him. That is the whole principle. It has application in all cases of incorporeal hereditaments: and, where there is a written title. As to incorporeal hereditaments, 1st, rights of way, not enjoyed for a number of years; though a convenience, if not a necessity for the enjoyment has existed: the Court directs the jury to presume, either, that it never did exist, or, that it was surrendered: upon this plain reason; the absence of any cause, why a man, possessed of a right, that is convenient or necessary to him, should in no instance have enjoyed it. So, as to the use of water and light; and, whenever a party has been long out of possession of an incorporeal hereditament, the question has always been determined in that manner. I have heard it stated, that this does not apply to the case of a public road. It applies more to that than to a private road. The reason given was, that there cannot be the same presumption of a surrender. If by matter of record the right appears vested in the public, it may be so; as there the right appears; and the surrender does not appear. But, if it does not rest upon matter of record, and the public have not enjoyed, it is to be left to the jury to presume, and is almost conclusive, not that it was surrendered, but, that it never existed; and for this special reason: one man may surrender, or for many reasons may not enjoy, his right: but the probability is, as to the public, that some instance of enjoyment would be shown. That is much stronger than the case of a private road, if for many years there has been no enjoyment; for what one man may relinquish, another may be disposed to assert.

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Principle of presumption from length of time.

As to incorporeal hereditaments, rights of way, public, as well as private, &c. presumption from length of time, that it was surrendered, or never existed.

Then, as to a presumption of title. 1st, as to a bond taken; and no interest paid for 20 years: nay, within 20 years, as Lord *Mansfield* has said: but upon 20 years the presumption is, that it has been paid; and the presumption will hold; unless it can be repelled; unless insolvency, or a state approaching it, can be shown; or, that the party was

Presumption of payment of a bond upon 20 years, or less, without payment of interest, unless repelled by circumstances

a near relation: or the absence of the party having the right to the money: or something which repels the presumption, that a man is always ready to enjoy what is his own. The case of a mortgage is an instance. I remember a case before Lord *Mansfield*, where a mortgagee brought his ejectment: the deeds proved, accompanied with a bond, all went for nothing: he had not received for 25 years, though living within a street of the mortgagor, any money upon the mortgage; and upon that the mortgage was considered satisfied. It has been said, you cannot presume, unless you believe. It is because there are no means of creating belief or disbelief, that such general presumptions are raised, upon subjects, of which there is no record or written muniment. Therefore upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming any thing like belief, the legal presumption holds the place of particular and individual belief.

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Mortgage presumed satisfied. no interest having been received for 25 years.

General presumptions upon the want of means of belief

That has been carried to this length. In *The Mayor of Kingston-upon-Hull* v. *Horner* (*a*) payment of the duties was shewn for three centuries. Why were the duties paid, if the parties were not bound to pay them? The Corporation produced their title, worth nothing; but the jury was directed to presume another grant, subsequent to that, which gave them the Port without the duty: a strong presumption certainly: but Lord *Mansfield* said it was a right presumption; alluding to the case before Lord *Ellesmere*. (*b*) [267]

So the case of *Chester-le-Street* (*c*) was stronger: the Curacy there being excepted upon the face of the grant. The question was not, as in the other case, whether it passed, or not.

Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief; which can hold only as to matters within our own time; upon which a conclusion can be formed from particular and individual knowledge.

But all this is nothing, where it can be seen, that the possession is provided for, and that is the stress of the argument, *viz.* that by this deed of 1664 the possession was to remain with the trustee; for it was a possession, until such time as the party was evicted: but if he was evicted, then the possession of course was not to remain to the uses of the settlement; but the conveyance was to be made according to the indemnity. Therefore it is said, none of these cases apply; as the foundation of them is, that the party [268]

(*a*) *Comp.* 102. (*b*) *Belle* v. *Beard*, 12 *Rep.* 4
(*c*) *Powell* v. *Milbanke*, stated *Comp.* 103, *ante*, vol. vi. 675

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was out of possession: but that is not so, where his possession is provided for. See, how that is, and what is the true meaning of this deed. The Manor of *St. Clere's* and *Heron's* was sold to *Gurdon* and *Knightsbridge*. There was to be security against some incumbrances, to have a speedy termination: for such an indemnity as an estate vested in trustees as an indemnity, not only against incumbrances likely to appear speedily, but at the distance of 1000 years, without any specific danger in the minds of the parties, has never occurred. A title is impeached on account of some specific objection, depending upon something to happen in a few years; and the indemnity must be co-extensive with the objection. The whole of this estate originally was conveyed to *Henry Mildmay*. That is the infirmity of the case; that the whole was conveyed. The object of the conveyance was, first, to secure the Annuities to Sir *Humphry* and Lady *Catherine Mildmay*: the latter continuing alive till 1694; and then this strange clause is inserted; which means, that in case of eviction the trustee shall convey one half of this estate to the uses of the settlement. Upon what ground? The whole estate being originally in my trustee for my indemnity, upon what ground, if I am evicted, is one half to be so conveyed? Through all this obscurity I can see the intention; that 11 years were the expected period of the infirmity of the title; and after that period this moiety was to be conveyed: not the remainder of the estate; for there was another security to be answered. That could not be conveyed till Lady *Catherine* was dead. A moiety was conveyed; as there was then an end of the obscurity and infirmity belonging to the title: but the residue was not to go out of the trustee; as Lady *Catherine* was living. I am bound to presume, that, whenever the danger of *St. Clere's* and *Heron's* was at an end, when that time arrived, which was designated by the period of 11 years, or any period, at which it could be said, there was no more danger, then that estate was to be saleable, and a re-conveyance was to be made.

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There is an answer then as to the length of time. Am I not to presume, that *St. Clere's* and *Heron's* is a good estate to the purchaser? It has not been disturbed for 140 years. If any claim were now set up, is it possible to say, such a Plaintiff could recover in ejectment? If that could be supposed, would not this Court grant a perpetual injunction against him; upon such a title, after uninterrupted possession for 140 years?

Here then is the application of these principles. I presume a conveyance from the trustee of the estate, intended as an indemnity against incumbrance, when for a century and more every idea of an incumbrance has been at an end; and if these presumptions are made after 20 or 30 years, because, the party being out of possession, all presumption

is against him, I make it in this instance. It would be very different, if the intention had not appeared upon the deed. But, when the time is designated, *viz.* 11 years, if I cannot do this at the end of 140 years, it is admitted, this objection must continue to any period. By supporting this objection I should lay down a rule most dangerous, and destroying the very reason of legal presumption. There is a defect and omission in the deed; not providing, that, when the Annuities are satisfied, there shall be a conveyance of the other moiety. My judgment is, that at this distance of time I ought to presume, that this re-conveyance has been made. I agree, I must make that presumption. My judgment is founded upon this, and I make the presumption without sending it to Law; being confident, a Judge must tell a jury, they ought to presume, and they would presume, that this re-conveyance had been made. [270]

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Therefore I am of opinion, that this decree ought to be affirmed. I give my judgment, laying down the general principle of law; and saying, this case comes within it. Nothing follows as to other cases.

MATTHEWSON *v.* STOCKDALE.

Feb. 27.

Though copy-right cannot subsist in an East India Calendar, as a general subject, any more than in a map, chart, series of chronology, *&c.* it may in the individual work; and, where it can be traced that another work upon the same subject is not original compilation, but a mere copy, with colourable variations, will be protected by injunction, which in the instance was continued until the hearing, without a trial at Law

A MOTION was made to dissolve an injunction, restraining the Defendant from publishing an East India Calendar or Directory; which the Plaintiffs alleged to be an infringement of their copyright.

The case, as it was represented by the answer, was, that the Defendant had originally undertaken a work of this nature; accepting an offer by the Plaintiffs, who were Clerks in the India-house, to procure correct lists; for which the Defendant gave them five guineas a-year between them. Disputes arising upon their demanding an increase of salary, which, as the Defendant's principal object in engaging them was the opportunity of representing in the title page, that the work was corrected at the India-house, he refused, the Plaintiffs applied to *Debrett*, another bookseller, who had set up a similar work, which the Defendant, not considering * that work an infringement of his copyright, did not attempt to oppose; and at length the Plaintiffs undertook, and continued, *Debrett's* work; the copyright in which this bill sought to protect.

Upon inspection of the books, though there was some trifling variation in the titles, the mode of printing was ex-

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actly the same; the pages containing the same number of lines; the indexes were the same; and, though the Defendant had inserted some new matter, principally the *Ceylon* establishment, which was introduced into the middle of the book, the pages were continued by means of asterisks, for the purpose, as was insisted for the Plaintiffs, of using their index without variation. Another instance of close imitation was pointed out in the name of *Smith*; there being of course a long list of persons of that name; and, the Plaintiffs not having adopted the mode of taking their Christian names in alphabetical order, neither was that mode taken by the Defendant; all those names being inserted in his book exactly as they stood in that of the Plaintiffs, without any particular arrangement. An error in the Plaintiffs' book, *viz.* the word "Commissioner" for "Controller" was also followed by the Defendant. The price of the Plaintiffs' book was 5*s.* 6*d.*; that of the Defendant's 2*s.* 6*d.*

Mr. Richards, and Mr. Heald, in support of the Motion, observing, that there is considerable doubt whether any copyright can be inherent in such a subject, insisted, that the piracy, if any, was committed by the Plaintiffs, the Defendant having possession first. They compared a work of this nature to a sea-chart, any man has clearly a right to publish amendments and additions. But, if he publishes them alone, without the whole, the work will be incomplete
272] and useless. It is difficult to reconcile Lord *Mansfield* with Lord *Kenyon* in the cases of *Sayre* v. *Moore* (*a*) and *Trusler* v. *Murray*. (*b*) Lord *Kenyon's* comparison to the case of poems does not hold: in that instance there is no necessity to publish the original work; as there is in the case of a sea-chart, or such a work as this. Additional poems might be published separately, having no connexion with the original work. The dilemma as to works of this nature is, that either the public cannot have the corrections; or the author of them must include the original work in his The indexes, consisting only of names, must be the same. From some passages of Lord *Mansfield's* judgment in *Miller* v. *Taylor* (*c*) it seems, that this Court will not interfere by injunction without a clear case: the effect in a work of this nature being irreparable mischief.

The Solicitor-General, and Mr. Wyatt, for the Plaintiffs, not maintaining, that an *East India* Calendar, generally, is the subject of copyright, insisted that the Plaintiffs have a copyright in their particular work, and, that the Defendant's publication appeared upon inspection to be a palpable piracy, a most servile imitation. They observed, that some passages in Lord *Eldon's* judgment in the *Universities of*

(*a*) 1 *East*, 361. *a*. (*b*) 1 *East*, 363.
(*c*) 4 *Burr.* 2303. See pages 2377 2400

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Oxford and Cambridge v. *Richardson*, (*d*) and *Hogg* v. *Kirby*, (*e*) show, that the passages in *Millar* v. *Taylor*, that have been referred to, are not now law; and, that the rule now is, that the Court will uphold the injunction, if there is doubt; and it is incumbent on the Defendant to clear away the doubt.

Mr. Richards, *in Reply*, observed, that in this case there was no such ground of jurisdiction as in *Hogg* v. *Kirby*; a breach of confidence; that the Plaintiff's copyright is very questionable, and, without putting it so strong as the passages in *Millar* v. *Taylor*, which have been since corrected, the Court must be satisfied, that the law is most likely to be with the Plaintiff: otherwise the Court will not interfere, for the Plaintiff stands upon the law. [273]

The Lord CHANCELLOR.—Thinking it dangerous to carry this doctrine of copyright too far, the turn of my mind would lead me to a different decision of this case from that, which, following what I find the established law, I mean to give. Several cases have occurred, in which it was at least as difficult to maintain copyright; and yet it has been maintained. In the case of Dr *Trusler's* Chronology, all the remarkable events, the accounts of eminent persons, every matter of curiosity and interest, were subjects of information past and gone by which could not be altered. All human events are equally open to all who wish to add to, or improve, the materials already collected by others; making an original work. No man can monopolise such a subject. Therefore Dr *Trusler* had no right to call upon that Defendant, if his mind had been concerned in the compilation; endeavouring to make improvements and additions. The case did not reach a decision; but went to an Arbitration. But it was stated by the Court, that, if the Defendant's work was a copy from the other, availing himself of all the arrangement, with alterations merely colourable, there could have been no doubt upon the right of Dr. *Trusler* to a verdict; and finally he had the decision in his favour.

There are several other cases. The next is the case of a map; and this Defendant was the Defendant in that case. He published the very interesting work of the late Mr. *Bryan Edwards*, and in it a map of the island of *St. Domingo*. The Defendant had not made a map from actual surveys; employing persons to improve or correct, but took a copy, with merely colourable alterations. It might be asked, how is it possible to have a copyright in a map of the Island of *St. Domingo*? Must not the mountains have the same position; the rivers the same course? Must not [274]

(*d*) *Ante*, vol. vi. 689. See page 707. (*e*) *Ante*, vol. viii. 215.

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the points of land, the coast connecting them, the names given by the inhabitants, every thing constituting a map, be the same? All those objections were urged. The answer was, that the subject of the Plaintiff's claim was a map, made at great expense, from actual surveys; distinguished from former maps by improvements that were manifest: the Defendant's map was a servile imitation, requiring no expense, no ingenuity; possessing nothing, that could confer copyright.

In the case of the chart of the *English* Channel I had to contend against the claim of copyright in such a subject; and the same observations were made. Must not the latitude and longitude of the several points upon the adjoining shores, and the soundings, be the same as they were placed by nature? They must be the same, or the chart must destroy the mariner. What room then can there be for originality upon such a subject. That may be a reason for not making a new chart or map: but it is no reason for a servile imitation.

Then how can this be detected? If both are correct, there will be considerable difficulty in determining, whether both are not original. I admit no man can monopolize such subjects as the *English* Channel, or Island of St. *Domingo*, or the events of the world, and every man has a right to take what is useful from the original work, improve upon it, and give to the public the whole, comprising the original work, with the additions and improvements, and in such a case there is no invasion of any right. In the case of *Patterson's* Road-Book (*a*) the roads were there, the distances the same: all these things must be the same. Error cannot be introduced for the sake of originality. but *Cary* succeeded upon this point; whether the one was a copy of the other; or, the roads, and every memorable place in *England*, being open to both parties, the one had made use of the other's work, as information which he was to add to or improve; not to make a servile copy. It turned out in these cases that the very errors were copied. The charts, representing twenty-five fathom water, where there was dry land, would have wrecked the mariner. In the Road-Book, where Mr. Justice *Grose's* beautiful seat, *The Priory*, is noticed, an error in printing his name was exactly copied. This occurring in several instances, was so decisive, that the Judgment of the Court, was, that the one work was a copy of the other.

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Applying these observations to this case, the manner in which it was put in support of the motion, made a strong impression upon me; and I had an inclination to dissolve the injunction; apprehending that I might injure the De-

(*a*) *Cary* v. *Longman*, 1 *East*, 358. *Cary* v. *Faden*, *ante*, vol. v. 21

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MATTHEWMAN v. STOCKDALE.

fendant; for it was well observed, that there is great difference between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very *different upon a work of this kind, perishable; particularly in this instance; consisting of the names of persons continually fluctuating: a work that would be good for nothing in another year. The Defendant had an opportunity of showing by his answer, that this is not a case for an injunction, and it would not be, if I only found the same names, additions, and places, in which respect the works must be similar, with improvements, amendments, and additions. The Defendant might have pointed out, what the amendments are: but he has put that upon me, alleging, that he has made a great number of amendments, and referring to an inspection. I have inspected this work. The first observation that occurs, is, that work of this nature was begun by the Defendant at a period more early than the Plaintiff's work. There is, [illegible] no contention between these parties for a copyright in an *East India* Calendar; which certainly is not a [illegible] copyright. But if a man, from his situation having access to the repositories in the *India* House, has by considerable expence and labour procured with correctness the names and appointments on the *Indian* establishments, he has a copyright in that individual work; which has cost him considerable expense and labour; and employed him at a loss in other respects, though there can be no copyright in an *India* Calendar, generally. In 1806 the Plaintiff's book came out, at the price of 5*s*. 6*d*. The Defendant thinking it imperfect, and capable of improvement, the natural inference is, that his book would be more expensive. But he publishes at the price of 2*s*. 6*d*.: his determination to publish probably being subsequent to the publication of the other work: and the foundation of his success therefore, enabling him to sell at that reduced price, that he did not go to the expense of original compilation; but made a *jac simile* of another work. I have compared these books; and find, that in a long list of casualties, removals, and deaths, there is not the least variation, even as to situation in the page. Upon the evidence in a Court of Law there would be scarcely any thing to try; and, though I do not approve extending copyright too far, I am bound under these circumstances to continue this injunction to the hearing; for the Defendant would merely have to account at the rate of 2*s*. 6*d*. for each book, and, if his publication proceeds at that reduced price, it will be impossible for the Plaintiffs, obliged by the expense they have been at to charge a much higher price, to sell another copy.

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March 14.

M'DONALD *v.* HANSON.

Assignees in Bankruptcy bound, as other persons, to make a good title, unless guarded by express stipulation.

Their bill for a specific performance therefore, the report being against the title, was dismissed.

THIS bill was filed by the Assignees under a Commission of Bankruptcy for the specific performance of an agreement by the Defendant to purchase an estate. The agreement was expressed in the usual manner. The usual reference to the Master was directed; and, the report being against the title, the cause came on for further directions.

Mr. Richards, and Mr. Hall, for the Plaintiffs, contended, that upon the authority of *Pope* v. *Simpson* (*a*) the Defendant ought to be compelled to accept the title from Assignees under a Commission of Bankruptcy, though not such a title as a purchaser, generally, would be compelled to take. At least, the Defendant ought either to take the title as it is, or to put an end to the contract, and deliver it up.

[278] *The Solicitor-General, and Mr. Heald, for the Defendant*, insisted, that the case cited could not be supported; that the Defendant was entitled to dismiss the bill, and there was no instance of compelling him to give up the contract under such circumstances, observing that he might choose to bring an action upon it.

The MASTER *of the* ROLLS.—I never could conceive, why Lord *Rosslyn* should have thrown out that opinion in *Pope* v. *Simpson*; which was not necessary; the objections being considered frivolous. If Assignees in Bankruptcy choose to advertise that they have not good title, or that they will sell only such title as they have, that is another thing. But if they advertise in the common way, there is no reason why they should not be bound, as other persons. In *Spurrier* v. *Hancock* (*a*) Lord *Alvanley* had no conception, that Assignees had such an exemption in their favour.

As to the question, whether the Defendant must either take the title as it is, or deliver up the contract, the bill is filed to obtain a specific performance; and must be dismissed. (*b*)

(*a*) *Ante*, vol. v. 11. (*a*) p. 278 *ante*, vol. iv. 667.

(*b*) See the opinion expressed by Lord *Eldon* in *White* v. *Foljambe*, *ante*, vol. xi. 337, against Lord *Rosslyn*'s opinion, in *Pope* v. *Simpson*.

1806.

ROLLS.
March 12.

HOLMES *v.* CUSTANCE.

Bequest "to the children of *Robert Holmes*, late of *Norwich*, and now of *London*, the sum of 100*l.* a-piece." *Robert Holmes* had left *Norwich* at the age of 14 or 16; and died in *London* several years before the will. His only surviving child entitled to the legacy against the claim of the children of *George Holmes*, formerly of *Norwich*, residing in *London* at the testator's death, upon the suggestion of mistake.(1)

The right not barred by merely signing a receipt as a witness(2) upon payment by the executor to the adverse party, not amounting to a release or fraud.

ISAAC HAUGHTON, of *Norwich*, by his will, dated the 1st of *May*, 1789, gave the following among other legacies:—"And to the children of *Robert Holmes*, late of *Norwich*, and now of *London*, the sum of 100*l.* a-piece."

The testator directed his legacies to be paid within twelve months after his decease, and appointed his sister, *Mary Haughton*, sole executrix.

The testator died soon afterwards. The bill was filed in 1804, by *James Holmes*, the only surviving child of *Robert Holmes*, claiming the legacy of 100*l.*, and interest, against the executor of *Mary Haughton*.

The defence set up by the answer and depositions, was, that the name "*Robert*," was inserted by mistake of the testator, instead of "*George*:" both *Robert* and *George Holmes* being distantly related to the testator, the former being dead at the date of the will; having died in *London* in 1782; leaving the Plaintiff, his only surviving child: the only other child he had, a daughter having died in her infancy: *Robert Holmes* having gone from *Norwich* to *London* at the age of 14 or 16, and only occasionally visited *Norwich* afterwards until his marriage; from which time until his death he resided in *London*: *George Holmes* having been formerly of *Norwich*, being resident in *London* at the testator's death, and having several children; some of whom residing at *Norwich*, were in habits of intimacy with the testator. Under the impression of these circumstances *Mary Haughton* had paid to each of the children * of *George Holmes* 100*l.* The Defendant also relied on the circumstance, that the Plaintiff was subscribing witness to a receipt, given by a trustee upon payment to him of the legacy of one of those children upon certain trusts: the Plaintiff being then clerk to that trustee.

The Solicitor-General, and Mr. Cullen, for the Plaintiff, distinguished this case from the case of a mistake of a name (*a*) corrected in favour of a legatee, by circumstances of description sufficiently pointing out the person; observing, that in this instance there was a person named *Robert Holmes*; that he had children, and the mistake was in the description only. They cited *Delmare* v. *Robello*. (*b*)

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Mr. Alexander, and Mr. Tower, for the Defendant, in-

(*a*) *Parsons* v. *Parsons*, *ante*, vol. i. 266.
(*b*) 3 *Bro. C. C.* 446, *ante*, vol. i. 412.

(1) See the note to *Baugh* v. *Read*, *ante*, vol. i. p. 209.
(2) See *Brinckerhoff* v. *Lansing*, 4 Johns. Cha. Rep. 65.

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sisted, that this was a mere mistake; which the Court would correct; and that the description could not apply to *Robert Holmes;* who had left *Norwich* many years ago; when he was very young; and was not living at the date of the will; and had left only one child.

The MASTER *of the* ROLLS.—It is perfectly clear, that this will cannot be varied. If this had not been a case of competition, but the executor had taken the objection, the name of *Robert Holmes* being found in the will, very strong evidence would be necessary. As to the mistake of the name, what I am to collect is, either, if the testator himself wrote the will, that he wrote the name "*Robert*" by mis-
[281] take, when he meant "*George*," or that, if another person wrote the will, that person by misapprehension of the testator's instructions wrote the name of "*Robert*" for "*George*." Then, considering it as a case of competition, none of these circumstances will do. First, as to the description "late of *Norwich*," not answering to *Robert*, who had not resided there for many years, every one knows the sense of "late" is, not recently, but formerly, of *Norwich*. Then, as to the circumstance, that he was not living at the date of the will; he was at a distance; and the testator might not have known his death, or might have forgotten it. As to his having left only one child, the legacy being given to "the children," the testator being at a distance, might not have known the state of his family; and meant only, that, if he had children they should have the legacies. In the case of *Delmare* v. *Robello* (*a*) the evidence was very strong; amounting to a high degree of probability, that the testator intended his sister *Rebecca;* yet Lord *Thurlow* would not venture so to decide. I cannot therefore vary the will upon this evidence.

I have some doubt as to the effect of the paper that is produced. The way in which that struck me is, as a fraud upon the other party; if the payment was made upon the admission of the Plaintiff, that he was not the person. But it cannot have that effect; for they proceed without any communication with that person. Their payment or resolution to pay, did not originate in any communication with him: but they exercised their own judgment; and then it comes to this only that the Plaintiff did not resist. There must be either something of a release, or a fraud by him in not setting up his claim. Clearly this does not amount to a
[282] release by him, nor any fraud in him. It does not appear, that he represented, that his father was not the person intended. They took it upon themselves: and he acquiesced. There is not enough therefore to bar the claim to this legacy; which must be decreed with interest.

(*a*) 3 *Bro. C. C.* 416, *ante*, vol. i. 412.

1806.

SANDERS v. POPE. (1)

March 12, 13.

Relief against forfeiture, where compensation can be made; as against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs in a given time; and not limited to cases of accident, &c. but even against negligence, and voluntary acts. (2)

BY indenture, dated the 15th of *March* 1799, *Pellatt Pope* demised a public house and premises at *Mitcham* to *Samuel Sanders*, his executors and administrators, for a term of 25 years from *Michaelmas* preceding, at the annual rent of 35*l.*; subject to a covenant, among others, that *Samuel Sanders*, his executors and administrators, shall and will before the end of the first five years of the said term, lay out and expend the full sum of 200*l.*, in substantially repairing and improving the premises; and a further covenant and proviso, that *Sanders*, his executors or administrators, shall not nor will assign, transfer, or set over, this present indenture of lease, or the term hereby granted, or any part thereof, or let, demise, or grant the said demised premises, or any part thereof, to any person or persons whatsoever, for and during the said term hereby granted, or any part thereof, without the license and consent of *Pope*, his heirs or assigns, in writing, &c.; provided, and it is hereby agreed and declared, that if the said yearly rent, or any part, shall be unpaid by the space of 21 days, &c. or, if the said *Samuel Sanders*, his executors or administrators, shall or do assign, transfer, or set over, this present indenture of lease, or the term hereby granted, or any part thereof, or let, demise, or grant, the said demised premises, or any part thereof, to any person [283] or persons whatsoever, for or during the said term hereby granted, or any part thereof, without such license or consent as aforesaid; or, if breach or default shall happen to be made in performance of all, or any or either of the covenants, conditions, or agreements, herein before mentioned and contained, on the tenant or lessee's part, the term shall cease; and it shall be lawful for *Pellatt Pope*, his heirs and assigns, to re-enter, &c.

By articles of agreement, dated the 23d of *April* 1799, it was declared, that *Samuel Sanders* undertook to execute an assignment, by way of mortgage, of his lease from *Pope* to *John Phillips*, for securing the payment of a debt, and a further sum *Phillips* was then to advance, in satisfaction of the debt and costs, in an action brought against *Sanders*; and

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(1) Cited, and remarked upon, 2 Johns Cha. Rep. 535.

(2) See the general rule stated by Chancellor *Kent*, 3 Johns Cha Rep. 535. The rule, however, as laid down by Lord *Erskine*, in the above case, may be considered as overruled by the current of the later cases. The case of *Rolfe* v. *Harris*, 2 Price Rep. (note) 206, decided by Sir *Thomas Plumer*, confines the relief to cases of *inevitable accident*, if the injury be capable of compensation, but if the acts of transgression be *wilful*, or *compensation impracticable*, the Court will not interfere. See also *Reynolds* v. *Pitt*, 2 Price's Rep. 212, (note.) S. C. 19 Ves. Jun. 134. *Hill* v. *Barclay*, 16 Ves. Jun. 402. S. C. 18 Ves. Jun. 56. *White* v. *Warner*, 2 Meriv. 459. See also *Skinner* v. *White*, 17 Johns Rep. 357.

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SANDERS v. POPE.

that *Sanders* thereby consented, that his said lease might be forthwith put into, and remain in the hands of *Phillips*, until the mortgage should be executed. The lease was deposited accordingly: but *Sanders* died in *June* 1799, the assignment of the lease not having been executed.

The bill was filed in *March* 1804, by the administrator of *Sanders*, and by *Phillips*, stating, that no part of the sum of 200*l.* had been laid out; that an ejectment had been brought in the names of *Pope*, and *James Moore*, to whom *Pope* had sold the premises; and insisting, that though the interest of the Plaintiffs was forfeited at Law, by breach of the covenant to repair, the Plaintiffs are entitled, in Equity, for the residue of the term, upon laying out the sum of 200*l.* in repairs, or otherwise making compensation for the breach; insisting, that the clause of re-entry was inserted with a view merely of compelling execution of the covenant to lay
[284] out 200*l.* in repairs; and, that the breach is open to compensation; as in any other case of penalty, for securing the performance of a covenant. The bill prayed accordingly a declaration, that the Plaintiffs are entitled for the residue of the term, upon laying out 200*l.* in repairs, and otherwise making compensation for the breach of the covenant to lay out that sum in repairs on, or previous to *Michaelmas* 1803, which Plaintiffs are ready and willing, and hereby offer, to do.

Evidence was entered into by the Plaintiffs to show, that the premises had sustained no material injury by the lapse of time; and by the Defendants, that they were in a bad state, and it would cost upwards of 300*l.* to put them in tenantable repair for a lease for 21 years, and there had not been any repairs done for 5 years preceding.

The Solicitor-General, Mr. Cullen, and Mr. Girdlestone, for the Plaintiff.—The fact is established in evidence, that no damage has been sustained from the omission to lay out the sum of 200*l.*, according to the covenant. The consequence is manifest, that the repairs required not being of such a nature, that any damage has arisen, the premises will be in a better condition by the expenditure at this time; the delay operating in favour of the landlord. Even upon the Defendant's evidence the inference of damage from the breach of this covenant is not conclusive: the question being upon the damage at the particular period; not, what may have been the consequence since.

This bill stands upon the equity, giving relief against forfeiture, where the party may be put in the same situation as if the covenant had not been broken; where it rests in
[285] pecuniary compensation; as in the instance of non-payment of rent; for which there is no other ground; though, by Statute (*a*) the bill must be filed within a certain time. The

(*a*) Stat. 4 Geo. 2. c. 28. s. 2.

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case of *Hack* v. *Leonard*, (*b*) is precisely this case: relief against a forfeiture for not doing repairs. That case was not cited in the late case of *Wadman* v. *Calcraft*. (*c*) The principle of relief in these cases is also established by *Cage* v. *Russell*, (*d*) and *Grimstone* v. *Bruce*, (*e*) *Descarlett* v. *Dennett*, (*f*) *Wafer* v. *Mocatta*, (*g*) *Rose* v. *Rose*; (*h*) and it has been extended beyond involuntary, to wilful breaches: *Northcote* v. *Duke*. (*i*) In *Hack* v. *Leonard* the covenant was, generally, to repair. This is rather analogous to the case of a stipulation to employ a specific sum for a particular purpose. There certainly are cases, in which the Court has refused relief against the consequences of negligence to repair, upon gross and wilful delay by the lessee, after repeated applications; and where the landlord cannot be restored to the same situation. in the case, for instance, of an assignment without license; where the Court cannot ascertain the pecuniary compensation for having a tenant forced upon him: In *Eaton* v. *Lyon* (*k*) Lord *Alvanley*, speaking of covenant, says, "if by inevitable accident, if by "fraud, by surprise, or ignorance, not wilful, parties may "have been prevented from executing it literally, a Court "of Equity will interfere; and, upon compensation being "made, the party having done every thing in his power, and "being prevented by the means I have alluded to, will give "relief." The circumstances of this case come within that reason: the death of the lessee within three months after the lease granted, intestate; leaving a widow and children; and the estate insolvent; and no evidence of any notice to the lessee to perform his covenant: the action commenced just after the expiration of the time; when immediate notice was given of readiness to do the repairs. [286]

Mr Richards, and Mr. R. Smith, for the Defendant.— The death of the tenant, and circumstances connected with it, cannot have any influence. In the case of covenant ignorance cannot be urged. The party is presumed by the law to know the effect of his covenant. The consequences of a decision, establishing the right to relief in this case, would be most extensive and important. This covenant is to lay out a specific sum of money in substantial repairs and improvements of a house in a certain time; not to pay money to the landlord, to be laid out by him; but the repairs to be made by the lessees; with a clause of re-entry for breach of any of the covenants. No substantial part of the money having been laid out, the right of entry accrues to the landlord; who insists upon his right; and the question is, whether this Court ought to interpose to relieve a

(*b*) 9 *Mod.* 90. (*c*) *Ante*, vol x. 67. (*d*) 2 *Vent.* 352.
(*e*) 1 *Eq. Ca. Ab.* 108. 2 *Vern.* 594 1 *Salk.* 156. (*f*) 9 *Mod.* 22.
(*g*) 9 *Mod.* 112. (*h*) *Amb.* 331. (*i*) *Amb.* 511.
(*k*) *Ante*, vol. iii. 690. See page 693.

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lessee, who has broken his covenant at Law. In most cases of a given sum of money, to be applied in a given time, the application cannot be made with equal advantage the year after. The Court cannot ascertain the compensation with reference to the time. The party claims relief against his own contract upon the simple ground, that he offers to lay out the money now, instead of having laid it out according to the terms of the contract. It is true, this is to be considered as a forfeiture: and the Court is in the habit of relieving against forfeiture and penalty. In the instance of a bond, that relief was given before the Statute: the object being only to compel the re-payment of money. If the money was repaid with interest and costs, it has been supposed, no inconvenience can arise: though, in a great number of cases, great inconvenience may be sustained by the party not having the money at the time, and the payment of interest and costs may be by no means an indemnity. That inconvenience however has not been regarded in Equity.

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The case of non-payment of rent stands precisely upon the same ground: so, in other cases, where the substance of the contract is performed in kind. But the relief is confined to instances of that description, where every thing can be set right except the time: and there is no case, except *Hack* v. *Leonard*, (a) in which the doctrine has been extended further. Why does not the assignment without Lease admit compensation? The new tenant may be preferable to the former tenant: or he may be capable of giving security: placing the landlord in the same situation: so that the compensation may be as complete as when the subject is money only: yet it has never been supposed, that relief could be given in that instance. Suppose, the premises had fallen down for want of repair during the pendency of the suit: how is the Court to give compensation? The compensation is not effected, unless they are placed in the same situation, as if the money had been laid out within the five years. In what way is the Court to give compensation by directing repairs to be done by the lessee? It has been held, that the Court cannot execute a covenant to rebuild or repair. (b)

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The authority of *The City of London* v. *Nash* (c) has always been considered questionable. The principle of *Wadman* v. *Calcraft* (d) applies closely. The serious situation of landlords, if this doctrine is to prevail, must be considered: the tenant waiting, till the time has elapsed: then giving notice, that he is ready to perform his contract, and filing a bill: the property in the mean time going to decay,

(a) 9 *Mod.* 90.
(b) See *Mosley* v. *Warren*, *ante*, vol. II. 184. and the references.
(c) 3 *Atk.* 512. 1 *Ves.* 12. (d) p. 288. *Post*, vol. X. 67.

1806.

SAUNDERS v. POPE.

The Solicitor-General, in Reply.—The injunction, granted by *The Master of the Rolls* in this case, shows, that there is no general proposition established, that this Court cannot relieve, except in the case of non-payment of rent. It clearly was not in the contemplation of these parties, that the money should be soon laid out: the period fixed being five years: that period being fixed with a view to the benefit of both parties: the delay, so long as it can be postponed without danger to the house, being advantageous to the landlord. As it is proved, that the house did not sustain damage, the lessor taking advantage of the literal expression of the covenant, makes a captious use of it: no application to have the repairs done being made: no intimation given, that, if the covenant was not strictly performed, the covenant would be insisted on. The objection, that this Court cannot superintend repairs, does not arise. The premises are not to be put in complete repair, but are only to be in the same state, as if 200*l.* had been applied at the time; and it is shown, that the delay has been beneficial to the lessor.

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March 13.

The Lord CHANCELLOR.—There is no branch of the jurisdiction of this Court more delicate than that which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle, that one party is taking advantage of a forfeiture; and, as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract, as originally framed, the Court will interfere, where a clear mode of compensation can be discovered. Of this nature is the case, that constantly occurs, confirmed by Statute, (*a*) giving a more ready mode of relief at Law: a contract to pay rent, with a covenant and clause of re-entry for breach. The obvious intention is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate: but may be enabled to recover possession of the premises. In that case Equity is in the constant course of relieving the tenant; paying the rent, and all expenses; and placing his landlord in exactly the same situation; and in that case it is not necessary, that the failure in paying the rent should arise from accident, the miscarriage of a letter with a remittance, insolvency, or disease: but even against negligence, the tenant being solvent, and not prevented by any accidental circumstance, Equity inter-

(*a*) Stat. 4 Geo. 2. c. 28.

1806.

SANDERS v. PORT.

feres; and, upon payment of the rent and all expenses, will not permit the tenant to be turned out of possession: considering, that in the one case frequently great hardship might be the consequence; in the other, the party being placed in the same situation, there is in general no hardship

[290] The case now before the Court comes nearest to that. This is not a covenant to repair merely; and an ejectment brought under the clause of re-entry for breach of that covenant, which may be a case of very complicated consideration, and much detail, as to what will put the party in the same situation: though even in such cases Courts of Equity have gone a great way: but the circumstances of this case are very different. Though this does not appear to be a beneficial lease, it is at a low rent, and no fine: the lessor secures to himself some valuable consideration in another form; by a covenant on the part of the lessee to lay out the sum of 200*l.* within five years by which the premises would acquire an additional specific value: that inducement coming in the place of an additional consideration; and that is secured by a clause of re-entry. If that covenant is not performed, two questions arise, which must always be kept distinct in the mind of the Court: 1st, the abstract question of jurisdiction, what the Court may do, which is a mere question of law: 2dly, what the Court ought to do in the particular instance. I agree, the death of the tenant does not make any essential difference. Upon the general question of jurisdiction the principle is clear, compensation. Whether in every such case the Court is bound to make the landlord accept it, is another consideration, depending on the discretion of the Court.

In *Gage v. Bussell (a)* I find laid down, that it is a standing rule of the Court, that a forfeiture should not stand where a thing may be done afterwards, or any compensation made for it. Forfeitures are even odious in law. Courts of Law, circumscribed as their jurisdiction is,

[291] struggle against forfeiture. If the landlord does any thing, receiving rent, for instance, relief may be had, without the necessity of coming to Equity. The forfeiture and the relief against it are founded upon this: the forfeiture arises out of the contract: the parties covenant for their own security: therefore the breach works a forfeiture: but, if the party can be restored to the same situation, the right to relief arises.

In *Northcote v. Duke (a)* the law is laid down almost precisely in the same way, and rather stronger; going further, as well as the case of *Hack v. Leonard, (b)* than the exigency of this case requires. Undoubtedly, unless it is plain, that full compensation can be given, so as to put the

(a) 2 *Vern.* 352. (a) p. 291, *Amb.* 511. (b) 9 *Mod.* 90

other party in the same situation precisely, a Court of Equity ought not to act; for such a jurisdiction would be arbitrary. In *De Scarlett* v. *Dennett* (*z*) the bill was dismissed; and the decision could not be otherwise. Sir *Joseph Jekyll* there goes a great deal further than I am prepared to go, holding, that wherever a breach can be established by damages, the Court will interfere. The Court must see, whether the damages are such, that it can be the subject of compensation. But this is payment of a specific sum of money: not general damages. The landlord in that case might be harassed by actions at a distant time, rights claimed over his property, and great future expence; and the best way was to turn out such a tenant immediately for injurious acts done, such, that no Court could ascertain the compensation. But the proposition, that, when the damages are uncertain, relief cannot be given, is equivalent to this; that in such a case as this, where clear compensation can be made, the rule should be different.

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SANDYS v. POPE

The next case is *Hafer* v. *Hewitt*, (*a*) before Lord *Macclesfield*. It is to be observed, that all these judges use the word "*damages*," as being uncertain, implying, that, if it is a subject admitting of certain calculation, though not a specific sum of money, as rent, relief may be given. I do not conceive, that language can convey what is the true and genuine principle of Equity more clearly than the case I last mentioned:—"Where a man makes a "lease for life or for years, upon a condition of re-entry for "a forfeiture, or that the lease shall be void, if the lessee "assigns or aliens it without license, and afterwards the "lessee doth assign it without license, this is a forfeiture; "and such a forfeiture, against which this Court cannot re-"lieve; because it is unknown, what shall be the measure "of the damages, for this Court never relieves but in such "cases, where it can give some compensation in damages; "and where there is some rule, to be the measure of such "damages, to avoid being arbitrary."

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One case has since occurred, which appears to break in upon the principle; though the decision is perfectly right, in the particular instance, upon the circumstances: but some words appear to have fallen from Lord *Alvanley*, which go against all that has been laid down in a series by preceding judges; and which, if they are taken in their full extent, would create considerable uncertainty. In that case, *Eaton* v. *Lyon*, (*b*) there was great *laches* and fraudulent conduct by the tenant; whose bill, after lying by for several years, to see whether it would be for her interest to apply, was very properly dismissed. But Lord *Alvanley* in the passage, (*c*) that has been stated at the Bar, expresses himself in terms, that would confine the jurisdiction very much.

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(*z*) 9 *Mod.* 22. (*a*) 9 *Mod.* 112. (*b*) *Ante*, vol. iii. 690
(*c*) p. 292, *Ante*, vol. iii. 693

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If the covenant is broken with the consciousness that it is broken, that is, if it is wilful, not by surprise, accident, or ignorance, still if it is a case, where full compensation can be made, these authorities say, not that it is imperative upon the Court to give the relief, but that there is a discretion.

I do not stop to consider, what should be the rule with regard to paying money at a particular day; further than to say, I do not assent to that proposition, that, though a full and clear compensation can be made, a Court of Equity has no jurisdiction; or ought not in any instance to exercise the jurisdiction, if it exists. I cannot agree, that it is necessary, the non-performance of the covenant should have arisen from mere accident or ignorance. Suppose the lessee had expended to the amount of 199*l.*; knowing, that the whole sum required had not been applied: the fact, that the expenditure was short by that trifling deficiency, existing; and not to be accounted for by ignorance or accident: can it be represented as consistent with justice or good sense, that the lessee, having by calling on his friends attached considerable custom to the house, the lessor, finding the premises by the conduct and industry of the lessee more valuable, should be permitted to turn him out; taking advantage of the circumstance, that 1*l.* or 2*l.* less than the stipulation had been laid out; or, that the money had been laid out 5 days too late; though he might be placed in the same situation, and obtain complete possession of all, for which he contracted? That would apply equally to a beneficial lease, upon a great expenditure of money, or for a long term of years. The last authority, the order of *The Master of the Rolls*, continuing the injunction in this cause, supports the jurisdiction.

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Then, if the jurisdiction is established, the next consideration is, whether it ought to be exercised, in this case. This is not a case of a complicated nature, making it difficult to give compensation. But I am not sure, whether any decree, that I can make, will be much benefit to the Plaintiff; for there must be complete compensation; including all the costs at Law and in Equity; which will place the Defendant in the same situation as if this had not happened. Upon the depositions no notice was given by the landlord, who immediately upon bringing the ejectment had an opportunity of doing justice: the tenant offering to lay out the 200*l.* and any ulterior sum, that might be necessary in consequence of the lapse. Subsequent to that all the conduct of the tenant was fair. The premises did not suffer damage from the omission to lay out the money before *Michaelmas* 1803; and therefore it is for the advantage of the landlord that the money should be laid out at a later period. The decree must provide, that, if the 200*l.* is not sufficient to put the premises in the state of repair,

in which they should have been placed at *Michaelmas* 1803, an ulterior sum must be paid. If the price of materials and labour have increased, that must not be thrown upon the landlord. The difference from that circumstance is much less complicated than what has occurred in the cases I have mentioned. Another reason, upon which this judgment stands, is, that this is an application to the indulgence of the Court. The Defendant is not in the wrong. He has done nothing, that did not arise from his clear legal right. In such a case therefore, Equity must take care, that compensation shall be made. The Plaintiff also must be supposed to have had the use of the money. Therefore there must be no delay in laying out this money; and an inquiry must be directed, whether any and what further sum is necessary to put the premises in the same state of repair, as which they would have been, if the money had been applied according to the contract.

1806. SANDERS v. FOX. [295]

Upon the suggestion of the offer by the Plaintiffs, immediately upon receiving notice, to lay out the money and make compensation, the costs in Equity were reserved.

LONGDON v. SIMSON.

ROLLS. *March* 14

Trust by will for accumulation beyond the Statute 39 & 40 *Geo.* 3. *c.* 98, is void only for the excess. Therefore, where directed until the age of 21 of the legatee, not then born, it is good for 21 years. Legacy to *A.* for life; then to her children for maintenance, and to be equally divided among them on their arriving at 21; followed by a legacy to *B.* "on the same conditions, on his attaining the age of 21." The legacy to *B.* construed in the same manner as the other: *viz.* for life only; &c.

WILLIAM WILLIAMS, by his will, dated the 30th of *May* 1801, gave and bequeathed the residue of his estate in the following words:

"To my niece *Mary Ann Williams* the sum of 5000*l.* "during life; after which to her children for their educa- "tion and maintenance, and to be equally divided among "them on their arriving at the age of 21 years. I give to "my nephew *Robert Williams* the sum of 3000*l.* on the "same conditions on his attaining the age of 21 years. I "also direct, that the shares I have in the *Monmouth*, "*Shrewsbury*, *Wisley*, and *Essington* and *Elsemere* Canals, "also in the *Liverpool* Waterworks, shall be paid up; and "the profits arising from them shall be invested one half "in the funds of * this country, and the other in the funds "of the United States of *America*: the interest arising to "be applied to the education of the children of the said

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"*Mary Ann Williams* and *Robert Williams* in equal shares; "and on their attaining the age of 21 years the whole to "be sold and divided equally among them. Should the "said *Mary Ann Williams*, and *Robert Williams* die with- "out issue, I give the above shares on the same conditions "unto the children of my friends *George Simson* of *St.* "*Paul's* church-yard, and *Jacob Kirkup* of *Walworth*. "The remainder and residue of my estate I give unto my "niece *Mary Ann Williams* and *Robert Williams* my ne- "phew, to be divided equally between them share and share "alike: my nephew not to have possession till he arrives "at the age of 21 years;" and he appointed *Simson* and *Kirkup* his executors.

The testator died in 1802; leaving *Robert Williams* and *Mary Ann Williams*, who married *John Longdon*, his next of kin. The issue of that marriage was one child; who died in 1804, a month old. *Robert Williams* was not married.

The bill was filed by *Longdon* and his wife, and the trustees in their marriage settlement, which comprised her interests under the will; *Robert Williams* being one of those trustees; praying an account under the will, and payment to the trustees, and also to *Robert Williams* in his own right; and that his interest in the legacy of 3000*l.*, and also the interests in the profits of the Canal shares may be ascertained.

Mr. Richards, *and Mr. Shadwell*, *jun. for the Plain-*
[297] *tiffs*.—The accumulation, directed by this will, goes further than the late Act of Parliament (*a*) allows. It must last according to the will during 21 years from the birth of a child. There is no child now born; and there may be many. In *Griffiths* v. *Vere* (*b*) the trust for accumulation was not considered void throughout, merely as it could not be carried to the extent intended. In that case the person, during whose life the accumulation was directed, was actually in existence. In this case there is no child now existing: a child may be born; may live a few years, and then die; and then another may be born.

The second question is upon the construction of the legacy to *Robert Williams*, whether he is entitled to it absolutely, or only in the same manner as *Mary Ann Williams*.

The Solicitor-General, *for the Defendants*.—Though the circumstances of the case cited are different, the construction that was put upon the Act of Parliament, is as applicable to this case as to that. The act was intended only to guard against the evil of accumulation beyond the period of 21 years. It was argued in that case, that the accumulation might extend beyond that period; and upon very technical

(*a*) Stat. 39 & 40 *Geo.* 3. c. 98. (*b*) *Ante*, vol. ix. 127.

arguments; as, that a life was a larger interest than 21 years. The true construction of the Act was adopted in that case.

1806.
LONDON v. SIMSON.

The MASTER *of the* ROLLS.—Suppose, instead of a life with regard to which there might be some uncertainty, the testator had said, the accumulation should continue 24 years: it would be good for 21 years within that determination.

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As to the question upon the interest of *Robert Williams* in the legacy of 3000*l.*, what can the words "on the same "conditions" mean, but in the same manner?

The decree accordingly directed the accumulation for 21 years from the death of the testator; and that *Robert Williams* should have the interest of the legacy of 3000*l.* during his life; and after his death the capital should go in the same manner as the preceding legacy to *Mary Ann Williams* was given.

GRIFFITHS *v.* HAMILTON.

March 14, 15.

Executors not trustees of the residue for the next of kin, two of them only having a legacy, expressed to be a testimony of regard; and immediately following a particular trust imposed upon them. (1) Parol evidence is inadmissible to the character of executor.

GEORGE HALLIFAX, factor in the *East India* Company's service on the west coast of *Sumatra*, by his will, dated at *Tappanooly*, the 8th of *November*, 1786, his debts being discharged, gave and bequeathed to his reputed son, *Thomas Hallifax*, the sum of 3000*l.*, three thousand pounds to his faithful housekeeper, the sum of 500 *Spanish* dollars, to be paid her at the expiration of one month after his decease. He then desired his executors, whom he should hereafter nominate, to deposit the sum of one thousand eight hundred dollars in the Company's Bank at *Fort Marlbro'*, on bond bearing * the usual interest of 10*l. per cent. per annum*; which interest he gave to his said housekeeper *Maria Lucy Houselman* during her life; declaring his request that the same may be paid her quarterly; and further gave her six slaves. The will then proceeded in the following manner:

The appointment of executors gives a joint interest in the residue, which, not being severed, survived

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(1) See the note to *Bennet* v. *Bachelor*, *ante*, vol. i. p. 63, and *Clennell* v. *Lewthwaite*, *ante*, vol. ii. p. 465.

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GRIFFITHS v. HAMILTON.

"*Item*, I do give and bequeath to my father *George Hal-*
"*lifax* and uncle Sir *Thomas Hallifax* five hundred pounds
"each.

"*Item*, after the death of my aforesaid housekeeper
"*Maria Lucy Houselman* the above sum of one thou-
"sand eight hundred dollars to be given unto my reputed
"son *Thomas Hallifax* and do appoint *Richard Maidman*
"*and Joseph Jefferson* Esqrs. trustees and guardians to him.

"*Item*, I do give and bequeath unto *Joseph Jefferson*
"and *Richard Maidman* the sum of 1000 dollars to be di-
"vided equally being a small testimony of my regard.

"*Item*, I do nominate and appoint *Thomas Palmer*,
"*Joseph Jefferson*, *John Griffiths*, *Richard Maidman*,
"*Sparkes Hoare* and *Alexander Drummond* Esqrs. now re-
"siding on the West Coast of *Sumatra* executors to this my
"last will and testament;" revoking all former wills.

The testator died at *Fort Marlboro'* in *December* 1786. In *October* 1787 *Griffiths*, who was at *Fort Marlbro'*, wrote to the other executors, declining to act. *Hoare* and *Maidman* proved the will in *India*. All the other executors except *Hoare* and *Griffiths* died. *Hoare*, having returned to *Eng-*
[300] *land*, in 1799 alone proved the will in *England*, and died on the 20th of *July* 1802. After his death *Griffiths* proved the will. A bill upon the *East India Company* for 1937*l.* 10*s.*, part of the estate of the testator *Hallifax*, was remitted from *India*, and after the death of *Hoare* came to the hands of his executors. A quantity of Gum Benjamin, also part of the estate of the testator, did not reach *England* till after the death of *Hoare*. The bill was filed by *Griffiths* against the executors of *Hoare*, and against the father of the testator; praying, that the Plaintiff may be declared entitled, as surviving executor, to all the testator's personal estate, not reduced into possession, and divided, previously to the death of *Hoare*. The Defendant *Hamilton*, the testator's father, claimed, as sole next of kin, on the ground of the legacies given to two of the executors.

The Solicitor-General, *Mr. Richards*, *and Mr. Owen*, *for the Plaintiff*.—Three questions arise in this cause: 1st, whether the Plaintiff can be considered as an executor: 2dly, whether the executors are beneficially entitled to the residue, or as trustees for the next of kin: 3dly, whether they are entitled as joint-tenants. The first of those questions does not admit of argument: the opposition to the Plaintiff's claim as executor depending merely upon a letter, hastily written; by which he declined to act. Upon that, *House* v. *Lord Petre* (*a*) is decisive. But, probate being now granted to him, that objection is concluded.

(*a*) 1 *Salk.* 311

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GRIFFITHS v. HAMILTON.

Upon the question, whether the executors are trustees for the next of kin, the result of the numerous *cases is this. Though the mere appointment of executor at Law vests the whole personal estate in him, where the residue is not disposed of expressly, a Court of Equity will look into the will; to see, whether there is any circumstance, showing, that the testator did not mean, that the executor should take it. Therefore, if he is appointed executor in trust, or if there is a disposition of the residue to a person who dies in the testator's life, showing, the testator did not intend by the appointment of an executor to give him the residue, or if a blank is left, though it is possible the testator might intend afterwards to give it to him; yet, as in all those cases, the testator appears not to have intended by the appointment of executor to give him the residue, he is a trustee for the next of kin. [* 301]

A rule is now established by a number of decisions, though much doubt has been entertained whether it is supported by solid reason, that, where there is only one executor, and a legacy is given to him, that is sufficient to deprive him of the residue. It has been said, the testator could not mean to give him a part and the whole; a most unsatisfactory reason; as the testator might, apprehending, that there would be no residue, wish to secure something for the executor in all events. That rule however has been so long established, that it is now the positive law of this Court. As little can the proposition be disputed, that executors are not trustees of a residue, not disposed of, where legacies are given to some of them only: the conclusion being, that the testator intended something more for those, who have particular legacies. The case of *Bowker* v. *Hunter* (*a*) has established also, that legacies to all the executors, but legacies unequal in amount, will not make them trustees.

By this will two only out of six executors have a legacy. [302] The argument must be, that the legacy is given in a form, and accompanied by words showing, that they were intended to be trustees; and, if any of them are trustees, all must be so. The principle, upon which it has been held that legacies to some of the executors will not make all trustees, must be, that an intention to favour those executors more than the others may be inferred. The intention of peculiar favour, which is implied in that case, is in this expressed.

The principle, that determines the case, where no legacy is given to the executors, is, that the residue is intended as a compensation for their trouble. That appears from the case of *Foster* v. *Mount*; (*a*) decided by Lord *Jefferies* upon the words "for his care and pains." In subsequent

(*a*) 1 *Bro. C. C.* 328. (*a*) p. 302. 1 *Ves.* n. 478.

1806.

GRIFFITHS v. HAMILTON.

cases, though no such expression was to be found, still the legacy has been considered as a compensation for discharging the duty; and at length it came to a positive rule. But in many late cases much disapprobation of that has been expressed: and it has been thought, that it would have been more wise to adhere to the rule, as it stands upon *Foster* v. *Mount*; requiring express words; and so great was the disapprobation of the extended rule, that Lord *King* thought an Act of Parliament necessary; and a bill was brought in, but was lost by accident with some other bills; not from any objection to it. The rule however has been adhered to in many cases. Where the legacy has been given expressly for care and trouble, which has been considered decisive, the cases are *Pachfield* v. *Careless*, (b) *May* v. *Lewin*, (c) cited there, *Davers* v. *Dewes*; (d) and the

[303] *dictum* of Lord *Hardwicke*. (a) The proposition, that if one executor is a trustee, all are so, is established by *White* v. *Evans*. (b)

In this case there is no evidence. The consequence is necessary, that, the legacy being expressly given, not for the care and trouble of the executor, but as a mark of regard and friendship, he will not be a trustee. Otherwise the decisions upon this subject must stand upon reasons, diametrically opposite and inconsistent. The bequest is, not as a recompense for trouble in executing the directions of the testator, but as bounty to a private friend.

The insertion of words, which the very gift imports, cannot vary the construction; and there is nothing else to take it out of the rule as to legacies to some only of the executors.

The next question, whether the executors did not take jointly what was not reduced into possession and actually divided, is plain. Many cases, the last, *Crooke* v. *De Vandes*, (c) have decided, that, where a sum of money or fund is bequeathed to several persons, without more, they take jointly; and that has been decided as to executors. This testator knew how to create a tenancy in common: the legacy of 1000 dollars to two of these executors being given in that way. But the appointment of executors is general. In *Partriche* v. *Powlet* (d) Lord *Hardwicke* held clearly, that a mere declaration by one party would not amount to a severance of the joint-tenancy.

[304] *Mr. Alexander, and Mr. Hart, for the personal Representatives of Houre, the executor, who acted*, concurred with the Plaintiff in contending, that the executors were not trustees of the residue.

Upon the question, whether they are entitled jointly, they admitted, that the residue undisposed of was taken by them

(b) 2 *P. Wms.* 158. (c) 2 *P. Wms.* 159. *n.*
(d) 3 *P. Wms.* 40. (a) 2 *Ves.* 97. (b) p. 303. *ante*, vol. iv. 21.
(c) p. 303. *ante*, vol. ix. 197. Vol. xi. 330. (d) p. 301. 3 *Atk.* 54.

originally as joint-tenants, but insisted, that either the transactions, that had passed, amounted to a severance in Equity; or, that under the peculiar circumstances of the case, the Plaintiff could have only a moiety. It is not contended, that the letter amounted to a legal renunciation; and the Plaintiff has since obtained probate. *Hoare*, having proved the will in this country, executed a Letter of Attorney to a person in *India* to receive the property there; himself receiving what was here. That agent invested effects, which he received, in a bill upon the *East-India* Company, payable to the order of *Hoare*; to whom it was remitted; and arrived a little after his death; and the sum, which was also obtained by that agent, was by him consigned to *Hoare*. Property, that was in the possession of a person, as his agent, and property consigned to him, must be considered as in his possession. The joint-tenancy might be severed in various ways. This property, thus in his possession, must be considered as collected by him; and his sole possession restrains the other joint-tenant from demanding more than a moiety. The case of *Crooke* v. *De Vandes* (a) is perfectly distinct. The question was, not, whether one of two joint-tenants having got in the estate, they were to be considered as joint-tenants; but, whether, various acts having been done for several years as to the personal estate, which the executors had got in, those acts were to be considered as evidence of an agreement to divide the whole; reaching some part of the property; as to which no act had been done. The letter of this Plaintiff had the effect of a declaration, that he would not be a joint-tenant with the other executors; for they were constituted joint-tenants only by the office of executors. The co-executor then proceeded to get in the property, and act upon it; considering the whole as his own. This Court, inclining against joint-tenancy, will not assist this Plaintiff, seeking to obtain the whole property.

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The Attorney-General, and Mr. Johnson, for the Father, sole next of kin to the testator according to the Statute. (a)—This is a question of intention upon the face of the will; and the conclusion is, that nothing more than an office was intended for these executors. It is clear, that a legacy to the next of kin will not exclude him from the residue, undisposed of. The will contains a sufficient indication of intention, that these two executors particularly should not take any part of the property, except what is expressly given to them; and that excludes all; for it is admitted, according to *White* v. *Evans*, (b) that, if one or more of the executors are trustees, all are trustees. In this will the legacy to

(a) *Ante*, vol. ix. 197. Vol. xi. 550.
(a) p. 305. Stat. 22 & 23 *Ch.* 2. c. 10 [illegible] (*Z. 2. . .*
(b) *Ante*, vol. iv. 21.

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these two executors immediately follows the special trust reposed in them; and the import of the two passages, taken together, is, that the expressions of regard are confined to these; and have reference to their character under the trust immediately preceding; not to that of executors. It is said, [306] these words import no more than the mere gift of a pecuniary legacy. But there are no such words used as to any other legacy: nor were such words ever used with reference to a party, intended to take any other part of the property. The question therefore is, not upon the mere effect of the legacy, but, whether the testator has not denoted, that all he meant for those, who were to take care of the child, was that legacy. That was to be the only token of his regard. Upon the other construction these words must be rejected: a course, never adopted, unless necessary to give effect to the general intention. The recent disposition of the Court has not been to give effect to that, which plainly was not intended; if the testator had been asked, whether his executors should take beneficially; and the Court lays hold of slight circumstances. The late authorities upon this question are *Urquhart* v. *King*, (a) *Sadler* v. *Turner*, (b) *Seley* v. *Wood*, (c) and *Williams* v. *Jones*. (d)

The Solicitor-General, in Reply.— The rule of construction upon this point is, not that the Court is to look through the will with anxiety to make the executor a trustee; but, unless the testator has expressly said, he intended to give the residue to another person, or, unless it appears, that he had not determined to whom to give it, or, that the executor was to be only a trustee; unless some one of those circumstances is made out, the Court must consider the executor as beneficially entitled. These rules have been so long established, that no discretion is left upon the subject. There can be little doubt upon this will, that the testator did intend [307] the executors to take the residue. He has made provision for his relations, and has imposed upon these six persons a very troublesome office. The plan of rewarding them by giving them the residue, instead of particular legacies, was reasonable; making it their interest to get in as much as they can. If he knew nearly the amount of his property, there could be no wiser disposition than to give particular legacies to those persons, who had natural and moral claims upon him, and the residue to his executors. An additional trust being imposed upon two of them, he gives them an additional reward on account of that additional duty, and if in giving that legacy, immediately following the imposition of that additional duty, he had used the words "care "and pains," it is not clear, that they would have been trustees of the residue.

(a) *Ante*, vol. vii. 225. (b) *Ante*, vol. viii. 617.
(c) *Ante*, vol. x. 71. (d) *Ante*, vol. x. 77.

1806.

GRIFFITHS v. HAMILTON.

Upon the points, as to the character of the Plaintiff, as executor, and upon the severance of the joint-tenancy, the reply was stopped by the Court

The Lord CHANCELLOR.—Upon the first question there is no doubt, that the Plaintiff, having probate, must here be taken to be executor. In a case at Law the Court of King's Bench would not hear the objection, that probate had been obtained by fraud; observing, that the party must go to the Commons; and repeal it. The point upon the severance of the joint-tenancy also clearly cannot be maintained merely upon the transmission of this property to *Hoare*, who died a short time before it arrived: no act done by him, raising an inference of an intention, or even a wish, to sever the joint-tenancy.

As to the remaining question, it is admitted, that the right of the executor to the whole personal estate of the testator is vested at Law; and it is only to be taken out of him by showing an intention not to give him the residue; even though the testator makes no disposition of it. That must either be decided by the will itself: or I must call upon the executor, if the case is doubtful, to rebut the presumption; and the Courts are rather delicate upon that subject in collecting parol evidence; where so much danger attends that medium of proof. I have looked into all the cases upon this point, and the excellent book by *Mr. Toller*. There was a good deal of intricacy and confusion upon this subject in former times; for in *Farrington* v. *Knightly*, (a) Lord *Macclesfield* desired to be attended with the precedents; which are very various and confused. This rule appears clear; that, where the executor has a legacy expressly for his care and trouble that amounts to a declaration by the testator, that he is not to take the residue beneficially: that legacy being given to him on account of the office he is to undertake; and he may, if he chooses, refuse to prove the will. If he takes upon him the execution of the will, he must be supposed to do so for the consideration, pointed out by the will. That is also laid down in *Rachfield* v. *Careless*, (b) and many other cases.

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Executor having a legacy expressly for his care and trouble, is a trustee of the residue, undisposed of, for the next of kin

The principle, established in *White* v. *Evans*, (c) that if one of the executors is a trustee, they are all trustees, is also clear. It must be so: as they must all take jointly, they must be all trustees, or all take the residue beneficially among them. But there is a great *difference between the cases of a sole executor and joint executors. If a legacy is given to a sole executor, without expressing any thing more, especially if he is a stranger, a fair inference arises, that it is given to him, as a trustee of the will; as a compensation

One of the executors being a trustee of the residue, all are trustees.

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(a) 1 *P. Wms.* 544. (b) 2 *P. Wms.* 158. (c) *Ante*, vol. iv. 21.

1806.

GRIFFITHS v. HAMILTON.

Unequal legacies do not make executors trustees of the residue.

for the trouble he will have in executing that duty; and there the law ought to have a fair and just inclination to the interest of the next of kin, entitled under the Statute. (a) But the case of co-executors certainly is different; for all the authorities agree, that, where the legacies to them are unequal, they are not trustees; but the effect is a preference *pro tanto* to one. This case falls within that range; for here there certainly is inequality: legacies to two; and nothing given to the other four. But we may go to the will itself; not disregarding the judgments and inferences, that have been made in other cases; but keeping them in mind; and giving them application to the case before the Court. Accordingly in *Urquhart* v. *King*, (b) *The Master of the Rolls* made a most judicious observation upon the will; that the testator made whoever should be the *American* Ambassador his executor; which, coupled with other circumstances, showed, it was not from personal regard; but looking more to his situation, as invested with that great trust. That judgment, therefore, was composed by referring to the maxims and rules upon which other Judges had decided; paying also proper attention to the will.

A legacy to the next of kin does not rebut the trust of the residue undisposed of.

Upon this will, if I had no other light, and no reference to what had been done by other Judges, the case is very strong in favour of the executor. It is settled, that a legacy to the next of kin affords no inference against his title: otherwise this would be the strongest case for excluding him; for the father is the sole next of kin, who must have taken the whole residue; and to these two persons, the father and uncle, the one the nearest relation, the other probably the only other relation the testator had, to whom he looked, he gives these legacies. This is a will by a man, not ignorant, but having legal assistance, knowing how to describe the situation he intended. When these persons are intended to be trustees, they are called trustees. The legacies to them are not given in the character of executors; and have no relation to that character; but are given to them, before he names them as executors, or intimates his intention to do so. The strongest circumstance is, that he gives these two legacies, before he mentions the appointment of executors. If the legacies to these two executors were given for care and trouble, the conclusion would have been, that he intended them to be the acting executors; and, being made trustees, the consequence would follow, that all must be trustees. But, as it is expressed, this is a case, in which the residue is to be taken by the executors, and there is no one to contest it with them for the reasons I have given.

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(a) Stat. 22 & 23 Ch. 2. c. 10. 29 Ch. 2. c. 3.
(b) *Ante*, vol vii. 235.

1806.

March 15, 17.

HORWOOD *v.* SCHMEDES.

Defendant cannot revive, except after a decree to account, or where the Defendant has some interest in the further prosecution of the suit: not therefore where his only object was to dissolve an injunction, and proceed at Law.

IN the cause of *Underhill* v. *Horwood* (*a*) in consequence of the Judgment, pronounced by Lord *Eldon*, an order was made, that the Defendant *Horwood*, the executor of *Coare*, the Annuitant, should be at liberty to proceed to the trial of the action brought by him against the Plaintiff *Underhill*, the surety, with liberty to him either to amend his plea, or to withdraw it, and plead *de novo*, and liberty to the other parties to attend the trial. The injunction was continued; and further directions reserved.

That cause having abated by the death of *Underhill*, the Plaintiff, a bill of revivor was filed by the Defendant *Horwood*, the executor of *Coare*, to which bill the Defendant, the executor of *Underhill*, put in a demurrer.

The Solicitor-General, Mr. Hollist, and Mr. Hart, in support of the Demurrer.—The ground of this demurrer is, that the Defendant has not a right to revive the suit; and the question is, whether after decree a Defendant can revive in any case, except a decree to account, or a decree having analogy to that; as for redemption; in which, of course there must be an account; though the bill is not strictly a bill for an account. But each party is just as much an actor; for if the mortgagor does not redeem by the time given, that operates as a foreclosure.

After a decree for an account, the Defendant is to be considered as an actor; as having the character of a Plaintiff, as it is uncertain on which side the balance may be. The Plaintiff in a suit for account is obliged to put himself in the situation of a Defendant; undertaking, if the balance shall be against him, to pay it. But from the nature of this suit, upon a bill to set aside securities for an Annuity, if the Plaintiff cannot have relief, the Defendant can have an interest only as to costs; and neither party can revive for costs merely. Lord *Redesdale* (*a*) states the doctrine very generally, and cites only two authorities; one, upon a decree for an account; and the other, though stating the proposition generally, is not a decision. The case (*b*) before Lord *Hardwicke* is an express declaration, that a Defendant cannot revive, except in the instance of a decree to account; as there the Defendant is an actor. *Stowel* v. *Cole* (*c*) also supports that

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Mr. Alexander and Mr. Bell, for the Plaintiff.—There is no mode, by which the Plaintiff can get rid of the in-

(*a*) *Ante*, vol x. 209. Affirmed upon a re-hearing *Ware* v. *Horwood*, *post*. (*a*) p. 312. *Mit* 73. (*b*) *Anon.* 3 *Atk.* 691.
(*c*) 2 *Vern.* 219. 296. 1 *Eq. Ca. Ab.* 5

1806.

HORWOOD v. SCHNEIDER.

junction in the original cause, except by proceeding in the cause. It cannot be by motion; the injunction having been ordered by decree, and no step can be taken in the cause pending an abatement. This Plaintiff also has an important interest in the further directions that have been reserved: the original Plaintiff, a surety, seeking an account of assets; in order that the grantee of the Annuity might be paid. This Plaintiff has therefore a clear interest to proceed in this suit; and there is no other mode of proceeding to get free from the injunction, and obtain relief against any of these parties, than by reviving, if they will not revive. As to the general rule, wherever a Defendant can from the [313] decree derive an interest in the prosecution of the suit, he may revive it. The opinion of Lord *Redesdale* is clearly expressed in opposition to the *dictum* of Lord *Hardwicke*. This is not confined to the case of an account; a right to a decree for payment of money. Any interest is sufficient. In the case of a bill for redemption, the decree is only that the bill shall be dismissed; not for payment of money. It is true, that operates as a foreclosure; but that proves, that, if the Defendant can show an interest, he has a right to revive. In the case in *Equity Cases Abridged*, (a) which was not strictly a case of redemption, and quite distinct from payment of money, the interest to have a conveyance made was considered sufficient. In *Stowel* v. *Cole* (b) there was a revivor by a Defendant; and that was confirmed by the House of Lords. *Whitbeau* v. *Hughes* (c) was certainly a strong measure: but the ground was, that the Defendant might file a bill; and the right arose only from his interest. In *Williams* v. *Cooke* (d) *The Master of the Rolls* says, "the "good sense is, that in every case, where a Defendant can de- "rive a benefit from the further proceeding, he may revive." It certainly has been generally understood, that even a Plaintiff cannot revive for costs only; though that is not clear of doubt; and was much discussed in a case (e) before Lord *Rosslyn*: who decided in that instance, that the Plaintiff might revive; leaving it doubtful as to a Defendant. What rational difference for this purpose can exist between the interest under a decree for an account and payment of money, and any other species of interest; perhaps a most important interest in real estate? The cases put at the bar in *Williams* v. *Cooke* are unanswerable: for instance, [314] the case of partition. Suppose every thing but the mere partition had been completed; would your Lordship direct all the preliminary measures to be repeated, merely because the Plaintiff would not revive? The interest of this Plain-

(a) 1 *Eq. Ca. Ab.* 2. (b) 2 *Vern.* 219. 396. 1 *Eq. Ca. Ab.* 3
(c) 1 *Dick.* 283. (d) *Ante*, vol. v. 406.
(e) *Morgan* v. *Scudamore*, *ante*, vol. iv. 195.

tiff under this decree is to dissolve the injunction, in order to have an opportunity of proceeding in the action, which is not gone, but may be revived by *scire facias*, and, if he recovers, to proceed upon further directions to obtain a decree for payment of the arrears from the surviving parties, and the assets of those deceased. Without a bill of revivor no proceeding can be taken for that purpose. How, without revivor, can the injunction be dissolved? They cannot be compelled by motion to revive within a certain time. The bill in the original cause is not only a bill for redemption, but also a bill of peace, to settle the rights of all parties. That was a case in which a Defendant ought to be permitted to revive, if it ever can be done. If this comes back with a decision either way, this Plaintiff will be entitled to a decree; either for the arrears of the Annuity, or for the remedy against the securities.

1806.

Horwood v. Scawens.

The Solicitor-General, in Reply.—Lord *Redesdale* even in the note (*a*) expresses doubt upon the proposition he lays down. There can be no distinction, with reference to this point, between decrees for a redemption and for an account; and the authorities apply to the latter only. The Plaintiff in a bill for redemption offers to pay what shall appear to be due from him on the account. In one case, if the defendant, the mortgagee, has been in possession, it is possible that nothing may be due to him; but the common case is a balance *prima facie* due to the Defendant, and the decree always directs the account, and payment of the balance: and if the Plaintiff will not pay the balance due from him, the effect is, that the Defendant obtains a foreclosure.

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With respect to the circumstances of this case, it is true, in the original cause a redemption of the Annuity is prayed; but in this way: the surety prays the redemption, not by him, but by his principal, in order to relieve himself. The grantee of the Annuity therefore cannot be entitled to any benefit from this suit; not having any interest in the relief prayed, nor any concern in the subject, except that he is restrained by the injunction. They might have applied by motion or petition, that the executors might revive the suit; or, that the injunction might be dissolved. The common case is an injunction before decree; and this injunction, intermediate between the original decree and the decree upon further directions, is unusual. But this decree provides for such an application; giving liberty to any of the parties to apply, as there shall be occasion; which provision, further directions being reserved, generally, can have no other object than that they may have an opportunity of stating any thing that may have happened since the decree;

(*a*) *Mitf.* 73

1806.

HORWOOD v. SCHREDES.

creating a necessity for some further order. Under such an application the order may be made, pending the abatement; and there are many instances of orders after abatement, and after decree; as if money is to be paid out of Court; or some formal act to be done..

The Lord CHANCELLOR.—This seems to me, not properly a decree in the cause, but rather a preliminary, interlocutory order, with a view to inquiry; before the Court can [316] do any thing, determining the rights of the parties. I do not think this party can have any interest: provided that he can have the injunction dissolved, or the bill dismissed altogether. He certainly has a right to put an end to the injunction.

The Register, being applied to by the Lord *Chancellor*, considered this as an order, though made at the hearing; not properly a decree. *The Solicitor-General* said, it was a decree, but of a peculiar kind.

March 17. *The Lord* CHANCELLOR.—It does not appear to me necessary in this case to enter into the consideration of the general practice of the Court upon bills of revivor; for, in my opinion this is not a case, in which the Defendant can possibly be allowed to revive. The ground, upon which a Defendant can seek to revive the suit, must be, that he has some interest under the decree; an interest therefore in the further prosecution of the suit.

This still appears to me to be a decretal order for an injunction, and an issue; not properly a decree. Under a decree, directing a mutual account, the Defendant becomes an actor; and the balance may be in his favour. He has, therefore, an undoubted interest in the prosecution of that suit; and, that it may be carried forward. But the only object of this party, a Defendant in the original cause, is to put an end to the suit, and dissolve the injunction; that he may go on at Law. There is nothing to prevent that: but there [317] is no interest now remaining in him to have this suit carried on by revivor. This is not, therefore, one of the cases in which a Defendant may revive, which are confined to matter of account, and where the Defendant has an interest in the further prosecution of the suit; as it is put by *The Master of the Rolls* in *Williams* v. *Cocke*. (*a*) Another ob-

(*a*) *Ante*, vol. x. 496

jection is, that the Defendant can have the right, only in case there is default by the other party; and there is no default; there being in fact a revivor by the Plaintiff.

The demurrer therefore must be allowed; and they may proceed in the ordinary way to get rid of the injunction.

1806.

HOLWOOD v. SCRIVENS.

THARPE *v.* THARPE.

March 24.

AN exception was taken to the Master's report, appointing a receiver.

The only objection taken to the person appointed, was, that he lived in *Suffolk*, at the distance of 14 miles from the estate, which was in *Cambridgeshire*: but it was insisted that the Plaintiff appeared intended by the testator to be the receiver. The Plaintiff was the second son of the testator; and afterwards became the eldest by the death of his brother: who left a son. The testator directing, that the Plaintiff should have liberty to reside in the mansion-house and premises at *Chippenham Park*, with the use of every thing therein, paying all rates, &c. that he should have the privilege of sporting upon the Manor, until the infant grandson should attain the age of 24, or the person, who should be first entitled in remainder after his death, should attain 21, with particular directions for the management of the park, &c. for the protection of the game, repairs, and planting, created a general trust of the real and personal estate for the grandson at the age 24, for life; with remainder to his first and other sons, and to the Plaintiff for life, and to his sons, in strict settlement. The Master appointed the receiver upon the recommendation of the only trustee, named in the will, who acted.

To maintain an exception to the Master's appointment of a receiver a strong case of disqualification is necessary.

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The Attorney-General, and Mr. Hart, in support of the Exception.—The general rule against excepting to such a report, unless some disqualification is shown, is unquestionable: but it is not imperative; and it has been often held, that exceptions will lie, if a proper case is made. *Creuze* v. *The Bishop of London*, (*a*) *Bowersbank* v. *Colasseau*. (*b*) In this case particular circumstances occur that will induce your Lordship to interfere. The ground of the exception is, that the Master ought, upon the circumstances in evidence, to have appointed the Plaintiff, the testator's son, to be receiver; to whom the mansion house is left, with many marks of favour in the will; which is sufficient;

(*a*) 2 *Bro. C. C.* 253. 2 *Dick.* 687.
(*b*) *Ante*, vol. iii. 161. *Wilkins* v. *Williams*, *ante*, vol. iii. 588.

1806.

THARPE v. THARPE.

though there may not be any positive objection to the person appointed. This son was intended to be the representative of the family during a long minority, and to have the consequence attached to that character; residing in the mansion-house, situated in the centre of the estates; with the liberty of sporting; and paying no rent. Under these
[319] circumstances it is not consistent with the intention to give another person, as receiver, control over him. The estate is situated in *Cambridgeshire*; and the receiver lives in *Suffolk*, at the distance of 14 miles. But, though there is no other objection to him, under the circumstances it is not necessary to state any positive disqualification, to entitle the Plaintiff to the appointment of receiver. The testator appears to point to some person, who will use extraordinary attention, beyond that of a common receiver; a person having a peculiar interest in the estate, as proprietor. The will directed 10,000 trees at least to be planted in every year: and has express directions to preserve the game; and for that purpose the Plaintiff is required to be resident.

Mr. Perceval, *Mr. Tower*, *and Mr. Leach*, *for the Report*, urged, that there was no objection to the person appointed by the Master upon the recommendation of the trustees, that the trustees were directed by the will to cultivate, manage, and improve, the estate, and that the testator when going to *Jamaica*, about two years before his death, executed a power of attorney to the Plaintiff and another person, jointly for the management of his affairs; expressly directing the latter to manage as to the land, as his son was not acquainted with farming concerns.

The Lord CHANCELLOR.—The cases cited are built upon principles that are not peculiar to this Court. All Courts place a degree of discretion in officers, appointed for the management of concerns, full of detail and complicated circumstances; and those, who impeach the judgment of those officers upon such points, must show a reason for the ex-
[320] ception. Lord *Alvanley* therefore in *Bowersbank* v. *Collusseau* (*a*) states truly, that the judgment of the Master is to be disturbed only upon special grounds: a strong case to show, that the person appointed ought not to be receiver? and the Court will not enter comparisons. No objection appears to the person appointed in this instance. He is a land surveyor, acquainted with business, likely to qualify him for such an office: a fit person therefore in that respect. He was recommended to the Master by the trustee, in whom the testator reposed this peculiar trust; not selected by the Master at his own discretion, or pointed out to him by accident. His residence at the distance of 14 miles only

(*a*) 1 Madd. vol. III. 164.

is no objection. The person proposed is therefore altogether unexceptionable. The effect of confirming the report will not be to deprive the Plaintiff of those advantages which his father intended for him; having the ornamental part of the estate under his own care, paying no rent, and with the enjoyment of sporting. There is no ground therefore to interfere with the Master's discretion in the appointment of a receiver; which has, I think, been wisely executed.

1806.

THARPE v. THARPE.

Exception over-ruled

CASES

IN

CHANCERY. &c.

THE SITTINGS AFTER HILARY TERM.

46 *Geo.* 3. 1806.

1806.

March 24. 26.

WHITE v. HALL.

Jurisdiction upon a contract concerning an estate in a Colony.(1) But the question upon the construction of the contract, for a security by way of mortgage, having been before a Court of competent jurisdiction in the Colony, and a foreclosure and judicial sale directed, the allegations of fraud merely general, and denied, an injunction was refused.

A MOTION was made for an injunction under a bill filed on behalf of infants, entitled to an estate in the Colony of *Demarara*, which had been brought to a judicial sale under a judgment, obtained in the Colonial Court by the Defendant, a creditor. The bill stated a contract, by which the estate was made a security for the discharge of the debt by instalments; the last of which was to become due in *November* 1806; charging, that about *March* 1804 the Defendant formed a scheme of obtaining possession, and enforcing a sale; with the view of becoming himself the purchaser at an under-value; and, contrary to the faith of the agreement, instituted process in the Colonial Court, upon a suggestion, that a large sum was due on account of the instalments, &c. The order of the Colonial Court directed execution and sequestration to issue according to the law of the Colony; and that the estate should at * the expiration of 15 months, if not redeemed by that time, be foreclosed, and put up to sale. The bill prayed a declaration, that the

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(1) See the note (1) to *Lord Chaworth* v. *Johnston*, *ante*, vol. iii, p. 170.

1806.

WHITE v. HALL.

Defendant was entitled only to have the net proceeds of the annual produce of the estate, until his debt should be discharged; but, in case the opinion of the Court should be, that he was not precluded from demanding immediate payment, then a redemption, and an injunction. The answer admitted the mortgage, recorded according to the laws of the Colony.

The Attorney-General, and Mr Hart, in support of the Motion, cited *Foster* v. *Vassall*, (a), and *Lord Cranstown* v. *Johnston*. (b)

The Solicitor-General, and Mr Bell, for the Defendant. It is not contended, that this Court has not jurisdiction over contracts relating to possessions in the Colonies of this country. But the jurisdiction does not hold in this particular case: a Court of competent jurisdiction having already determined between the parties. The Court, if it could hold jurisdiction, must have learnt what is the law upon this subject in the Colony of *Demarara*, as a fact; of which no evidence is given. The case of *Lord Cranstown* v. *Johnston* arose in a Colony subject to the *English* law; except as it had been altered by Acts of Assembly; and the same observation applies to the case there referred to: but cannot apply to this case. Without inserting, however that this Court cannot hold jurisdiction, merely as *Demarara* is a *Dutch* Colony, you must also prove what is the law of that Colony, and cannot take it to be the same as the law of this country. *Lord Cranstown* v. *Johnston* was decided upon circumstances, that have no application to this case. That was a contrivance by a creditor to get the estate at an undervalue. In this case the question has been decided by a Court of competent jurisdiction. The case of *Foster* v. *Vassall* (a) does not prove, that the Defendant, in stating that defence, that the question has been decided by a Court of competent jurisdiction, must state with great precision all the pleadings, with particular averments, that the suit related to the same matter, &c. That was the case of *Lis pendens*, used by way of plea in bar of another suit; and it was necessary to show by averment, that the cause related exactly to the same matter.

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March 26.

The Lord CHANCELLOR.—If I had jurisdiction in this case, which I have not, I should be disposed to consider this estate merely as a security, until all the instalments should be paid up; and that the intention was, not, that upon a forfeiture of the first instalment the estate should become absolute in the creditor; but that he should have

(a) 3 *Atk.* 587. (b) *Ante*, vol. iii. 170. (a) p. 323 3 *Atk.* 587

possession and receive the rents and profits in reduction of the debt. The covenant to keep 350 negroes upon the estate has an aspect to that; being for the benefit of the mortgagor. The construction therefore of the contract, if it had been necessary to decide upon it, would be, that the mortgage was not absolute until the expiration of the period for payment of the last instalment, at which time the right to foreclose would arise according to the law of this country. But the circumstances of this case preclude me from exercising any jurisdiction. The suggestion of fraud by the bill is distinctly denied by the answer; and also is too general an averment of fraud; which cannot be averred in such general terms. But the facts, constituting the fraud, ought to be stated, so that issue can be taken. [324]

1806.

WHITE v. HALL.

I perfectly concur with the case of *Lord Cranstoun* v. *Johnston*; (a) which was decided upon the foundation of fraud: the creditor not being justified in bringing the estate to sale under those circumstances: a sham sale, without competition, contrived with a view to get the estate himself at an under-value. The principle upon which that decree was made is, that a transaction of that nature may be overhauled for fraud. Upon that subject I will use the words of a great authority, Lord Chief Justice *De Grey*; who, when delivering the answer of the Judges to a question put to them in the Duchess of *Kingston's* case, thus expresses himself: (b) "fraud is an extrinsic, collateral, act, violating the most solemn proceedings of Courts of Justice, as Lord *Coke* says, avoiding all judicial acts ecclesiastical and temporal."

The only question for me to consider upon this motion is, whether I have authority to set aside a judicial sale, had under the process and judgment of a Court, having a competent jurisdiction, not only intrinsically, but under the acts of the parties. I have no such authority. I hope, however, means may be found to deliver this estate from sale; if the law of this Colony is not peremptory, and essentially different in that respect from the law of this country. The Lords of the council may, perhaps, give some direction to prevent a sale, until an appeal; or security may be given. That is for their consideration; but I am obliged to refuse this injunction. [325]

(a) *Ante*, vol. iii. 164.

(b) The Duchess of *Kingston's* Case, *Hargr.* State Trials, 607.

1806.

March 28.

BOWES v. LORD STRATHMORE.

After an order upon a party in the cause for payment of money, the proper course is an attachment; and upon the return to that an order for commit.

THE Plaintiff having obtained an order for taxation of his solicitor's bill of costs in the usual manner, offering to pay what should be found due, an order was made for payment of the money; or, that the Plaintiff should stand committed.

Mr. Thomson, upon affidavit of service of that order, and, that the Plaintiff, who is a prisoner in the King's Bench Prison, said, he would not pay, but would go to the Fleet Prison, moved for a writ of *habeas corpus*, to bring him up, that he may be committed to the Fleet Prison.

The Register, *Mr. Walker*, *and Mr. Tollist* (*amicus curiæ*) said, that in the case of a party the first order should have been for payment of the money; and afterwards an attachment upon that; and upon the return to the attachment, the order would be made for the writ of *habeas corpus*.

The Lord CHANCELLOR held that course to be regular

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March 27, 28.

RADCLIFFE v. WARRINGTON.

The time at which a contract is to be performed, is not essential in Equity, as at Law. (1)

The relief against the lapse of time is in the discretion of the Court upon the circumstances; as, if the contract is abandoned.

Whether upon the sale of an Annuity, charged upon a real estate, the vendor must make out the title of the grantor to the estate charged, *Query*.

ON the 24th of *August* 1805 the Plaintiffs, as executors of *John Radcliffe*, sold by auction to the Defendant an Annuity of 120*l.* for the sum of 900*l.* The particular described this Annuity as being undeniably secured, and most punctually paid quarterly by *Messrs. Biddulph* and *Cocks*, Bankers, for the life of a very respectable nobleman, aged 54; whose life could be insured; amply secured on freehold estates, in the County of *Huntingdon*. The conditions of sale provided, that the purchaser should pay a deposit 20*l. per cent.* and sign an agreement to pay the remainder of his purchase money on or before the 29th of *September* next; and, that if he should neglect, or fail to comply with the conditions, the deposit should be forfeited; and the executors should be at liberty to re-sell either by public or private sale; and the deficiency, if any, by such second sale, with all the charges, &c. should be made good by the defaulter at the first sale.

(1) See the note (1) to *Seton* v. *Slade*, *ante*, vol. vii. p. 278.

1806.

BARCLIFFE v. WARRINGTON.

Upon the application of the Defendant's Solicitor on the 30th of *August* for an abstract, the deed, dated the 17th of *May* 1782, was sent; purporting to be a grant of the Annuity in consideration of 840*l.*; secured by bond and warrant of attorney, and charged upon and issuing out of a Manor in the County of *Huntingdon*. The Solicitor of the Defendant on the same day objected, that the abstract did not contain the grantor's title to the estate, on which the Annuity was charged; and requesting to be furnished with it. On the 3d of *September* the Plaintiff's Solicitor by letter, stated, that he had it not in his power, nor did he think it necessary, that the grantor's title to the estate, charged [327] with the Annuity, should be set out. The Defendant's Solicitor on the same day insisted on that objection; and required the title to be furnished as soon as possible; as the Defendant was staying in town solely on that business. On the 17th of *September*, another letter by the Defendant's Solicitor to the Plaintiff's Solicitor stated, that "*Mr. War-*"*rington* will insist on having the said purchase completed "by the 29th instant, agreeable to the conditions of sale; "and he will be ready without deviation to fulfil his part "of it: but he expects in a proper time to have a proper "abstract of the vendor's title delivered to him; and, as I "have already informed you, he considers the one already "delivered as none at all. With regard to the Annuitant "dying before the 29th, *Mr. Warrington* is advised, it is a "thing he has nothing to do with, till a proper title is "made, and his purchase completed, in conformity to the "conditions of sale."

No answer being returned to that letter, an action was brought in *October* 1805 for recovery of the deposit. On the 17th of *January* 1806, after that cause was at issue, the abstract required was offered; and refused. Upon the 27th of *February* the Defendant obtained a verdict in the action. On the 4th of *February* the bill was filed, praying a specific performance, and an injunction.

The answer insisted, that, as the Plaintiffs did not deliver, or tender any abstract of the title of the grantor until the 17th of *January*, and after the cause was at issue, the contract was determined; and the Defendant is not bound to perform it: the bill contending, that the Annuity-deed, with the fact of regular payment to the death of the grantee in 1805, was a sufficient title: but stating, that the Plaintiffs having procured the abstract, sent it to the Defendant's [328] Solicitor, who refused to receive it.

The Solicitor-General, and Mr. Ainge, in support of the Motion for an Injunction, contended, that time is not essential in the performance of a contract; and among the numerous authorities in support of that proposition there is no instance of refusing a performance upon the mere ground.

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that the time had elapsed. They also insisted, that the vendor was not bound to produce the grantor's title to the estate charged with the Annuity.

The Attorney-General, and Mr. Martin, for the Defendant.—By many old decisions certainly the time, at which a contract is to be performed, was under particular circumstances held not to be material. But, from the time of Lord *Thurlow*, the habit of the Court has been much more to consider the time material: *Harrington* v. *Wheeler*. (*a*) Considerable stress had been laid upon the supposed authority of Lord *Hardwicke* in the case of *Gibson* v. *Patterson*: (*b*) but Lord *Rosslyn* in *Harrington* v. *Wheeler*, and *Lloyd* v. *Collet*, (*c*) denies the accuracy of that case: and shows, how much the opinion of the Court upon this subject had varied.

Time may be made material, if one party apprises the other, that he means to insist upon it. The question is, whether one party cannot previously to the expiration of the time say, that he will insist upon it. In the late cases, [329] though the time had been insisted on, the Defendant, having after the expiration of the time received and dealt with the abstract, that was properly held a waiver of the previous notice. The question upon the circumstances of this case was determined in *Lloyd* v. *Collet* (*d*) The case of *Seton* v. *Slade* (*b*) turned upon this; that the purchaser, though to a certain period he insisted, that the contract should be performed by the time, afterwards received the abstract; and dealt with it. In this case the abstract was immediately refused. Lord *Eldon* marks the distinction in that respect between that case and *Lloyd* v. *Collet*; which latter case this resembles; and the circumstances in both are directly the reverse of those of *Seton* v. *Slade*. This Defendant returned the abstract, and would not look at it; and the Plaintiff had no reason to think, the Defendant considered himself bound by the contract; the contrary being expressly asserted. The question is, whether a Court of Equity can deprive the party of all right to stipulate, that the time shall be material. Suppose this case had been reversed, that the purchaser had not performed his engagement, and a re-sale had taken place; could he have been relieved? The old decisions, that the time was not material, do not stand upon good reason. Suppose the contract is entered into with reference to a particular estate, or the public funds, the value of which is affected by the delay.

Upon the other point, the Plaintiff, by producing the title to the estate, admits that he was bound to produce it.

(*a*) *Ante*, vol. iv. 686. (*b*) 1 *Atk*. 12
(*c*) 4 *Bro. C. C.* 489, *ante*, vol. iv. 689 note (*b*)
(*d*) p. 329. 4 *Bro. C. C.* 469, *ante*, vol. iv. 689. note (*b*).
(*b*) p. 329. *Ante*, vol. vii. 265.

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The Solicitor-General, in Reply.—Time is not considered essential, or in any degree regarded, in Equity, unless there is something peculiar * in the contract. It can have effect only as evidence, that the agreement is abandoned. If time is considered in the same point of view in this Court as at law, one-third of the jurisdiction of this Court is at an end. In the case of a mortgage there is an express stipulation for payment on a certain day; and the estate is at Law absolute in the mortgagee: yet without fraud, accident, or other equitable circumstances, redemption is permitted, without limitation of time, provided it has been treated as a mortgage; and even after a decree for foreclosure, if not made absolute. In the case of a covenant for payment of rent, making the lease void in case of non-payment at the day, no defence could be made at law, yet the relief would be given in Equity upon the terms of paying the rent, with interest; subject to the limitation prescribed by the Statute. (*a*)

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The principle, that time is not essential in any contract in a Court of Equity, that time is never used here further than as evidence that the agreement is abandoned, has been applied to the doctrine of specific performance in some of the strongest cases. In the case of *Gregson* v. *Ridale*, stated (*b*) in *Seton* v. *Slade*, notwithstanding express terms, the agreement not being abandoned, the Lords Commissioners gave execution; and that was confirmed by Lord *Thurlow*, who, upon *Mr. Mansfield's* observation, that the decision would make it necessary, in all future cases, to provide that the contract, if not carried into execution by the time stipulated, should not be executed, answered, that then the party would be just in the same situation. To that extraordinary length have the cases gone: and there is no authority, that time shall be considered essential without something special; and there is nothing special in this case. This purchaser could not possibly be injured by the lapse of time from the nature of the contract. This is not like a contract for a reversionary interest; in which from the nature of the subject time certainly is essential. The argument, that the purchaser, finding the time past, had bought another estate, has been urged without success. Cases have occurred, where the vendor had no title, even when the cause was heard, and it has been permitted to stand over, to enable him to obtain a title, by procuring an Act of Parliament. In *Seton* v. *Slade* all these distinctions were noticed by Lord *Eldon*, who expressly states, that it is impossible to say, time is regarded here as at Law. The case of *Lloyd* v. *Collet* has no application, being a case of complete abandonment.

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(*a*) Stat. 4 *Geo.* 2. c. 28. (*b*) *Ante*, vol. VII. 268.

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As to the other point, whether the vendor is bound to shew the title of the grantor to the estate, charged with the Annuity, it has been long disputed, whether upon a contract to sell a lease, the vendor is bound to make out that the lessor has a good title. (*a*) This objection goes much further. It cannot be said, the Plaintiff has admitted, that he was bound to produce the title. Insisting, that the objection was unreasonable, he consented to obviate it, merely to avoid litigation. He cannot be supposed to undertake to make out a title to the estate of another person in a month.

The Lord CHANCELLOR.—One answer to many of the objections, that have been urged, is obvious, that the unquestionable jurisdiction of a Court of Equity to give the specific performance of an agreement for the breach of which the party could have only damages at Law, is not
[332] compulsory upon the Court, but the subject of discretion. The question is, not what the Court must do, but what it may do; under circumstances either exercising the jurisdiction by granting the specific performance, or abstaining from it. It is admitted, that there may be such a refusal to perform an agreement, as would amount to a complete abandonment; so that the contract would be gone in Equity, as well as at Law: but I do not conceive, the refusal to produce the title in this instance does amount to such an abandonment. The answer of Lord *Thurlow* to the observation of *Mr. Mansfield* in *Gregson* v. *Riddle*, (*a*) going to the extent, that even an express provision could not be made to guard against the inconvenience of the doctrine, that the time is immaterial, is a very strong proposition. My present opinion is, that the authorities cited for the Plaintiff do maintain the jurisdiction in the extent, to which it is contended; and that this is not a case of abandonment: but I will look into the cases. In the instance of a mortgage, relief is given upon the ground that the whole intention originally was to secure the money: so in the case that has been put of a covenant to secure the payment of rent. That is the object of the contract; and the Statute (*b*) proceeds upon that. Cases of that description are different from a sale.

Ground of redemption of a mortgage, and of relief against non-payment of rent, that the object is a security.

March 28.

The Lord CHANCELLOR.—Upon the objection, that the title of the grantor of the Annuity to the estate charged with it, was not made out, it must always be recollected, that the grantor had been in possession of the estate since 1782: and the Annuity had been regularly paid; without
[333] determining, that it was absolutely necessary for the ven-

(*a*) *White* v. *Polyambe*, *ante*, vol. xi. 337.
(*a*) p. 332. Cited *ante*, vol. vii. 268 (*b*) Stat. 4 Geo. 2. c. 28

dor, in order to make the contract good at Law, and to keep the party bound to furnish, not only the deed of 1782, containing upon the face of it a rent-charge, but also the title of the grantor to the estate upon which it was charged. The letter of the 3d of *September* from the Plaintiff's Solicitor, stating, that it was not in his power, nor did he think it necessary, that the title to the estate should be set out, contained nothing that could lead the purchaser to suppose there was any doubt concerning the validity of the title. There is no doubt this contract was completely determined at Law: not from a failure, to perform any of the essentials of the contract, nor from the want of title, but from the failure of the vendor to do in time what was incumbent upon him. It is equally clear, there was no abandonment by the vendor.

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At first I found great difficulty in the extent of the proposition, that time is of no consequence in this Court. To that I cannot accede. It is frequently of great consequence. It is enough, however, for me to express myself in the safe words, used by *Lord Alvanley* "to say time is regarded in "this Court as at Law, is quite impossible." But, though there is an end of the contract at law, as there is undoubtedly, if the parties do not perform the acts they were bound to do within a certain time, still, if there is jurisdiction here, and from all the authorities it is clear there is, this is a case, in which the Court may, and ought to, exercise it. In this instance there is no vexation; no room for suspicion of any trick. It can be represented at most as a mistake of the agent in not sending the title; which probably it was not in his power to send, if his judgment had been otherwise. But it would be very dangerous to have it understood, that contracts at Law as to time are nothing in this Court; that the party might trifle as long as he thought proper, and come here as a matter of course, at any distance of time. So, the principles upon which the Court relieves against fraud, or accident being clear, it would be dangerous to attempt to lay down any abstract rule, under what circumstances that jurisdiction ought to be exercised. In a late case, (*a*) a tenant coming to be relieved against the lapse of time for doing repairs, I did not hold, that under all circumstances a tenant shall be justified in neglecting to do repairs, and come here, as of course, offering to put the landlord in the same situation. If any vexation appeared, the Court might refuse to interfere. It is matter of discretion; and that way of considering it avoids all the difficulty in the exercise of this jurisdiction. The case of the mortgage turns upon circumstances peculiar to it. The single object of the transaction in its original construction is to

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Relief to a tenant against the lapse of time for repairs in the discretion of the Court upon the circumstances.

(*a*) *Sanders* v. *Pope*, *ante*, 282.

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Ground of redemption of a mortgage, that the object is a security for money.

create a security for money. The Court by permitting redemption, does not dispense with any thing, for which either party contracted; but gives effect to the original object of both. So, the covenant for payment of rent is inserted, in order to give security to a party, demising his estate for a time. He brings an ejectment; which is used as a spur; and the true object of the contract is obtained, either under the Statute; (*b*) or, if the case is not within the Statute, this Court gives the relief in cases that appear fit for it; and I think this a proper case for giving such relief.

335] Therefore, without laying down any other rule, or making any further observation, than merely to express my assent to the doctrine, as stated by Lord *Eldon*, my judgment is, that a specific performance ought to be granted in this case; and therefore the injunction must go upon the terms of bringing the money into Court, and paying the costs at Law.

May 5. 5

JAHILL v. SHEPHERD.

Commission to examine witnesses in an enemy's country.

A MOTION was made by the Plaintiff for a Commission to examine witnesses at *Seville* in *Spain*. The bill had no other object; and the Defendant by his answer did not deny, that the evidence sought for was material.

Mr. Richards, *for the Defendant*, opposed the motion, on the ground that *Spain* was at war with *England*, and the Court ought not to grant a Commission to an enemy's country; and added, that it would be unfair to the Defendant; who, residing here, might not be able to examine such witnesses so advantageously as the Plaintiff, who was living on the spot.

The Solicitor-General (*amicus curiæ*) said, he apprehended, that the practice was to direct the Commission to the nearest neutral port; and mentioned the case of ——— *v. Romney*. (*b*)

Mr. Gregg, *in support of the Motion*, said, that the objection could not be raised now; and contended, that, if the Defendant meant to take advantage of that argument, it was

[336] the subject of a plea; he ought to have pleaded to the bill, that the Plaintiffs were alien enemies; and, not having done so, (even if there was any thing in such an objection,) it could not be raised after answer. He insisted, with respect

(*a*) *Ex relatione*. (*b*) *Amb.* 62.

to the case cited from *Ambler*, that it is by no means an authority against this application. 1806.

CAMEL v. SHEPHERD.

The Lord CHANCELLOR made the order according to the motion. *May* 4

HEYES v. EXETER COLLEGE, OXFORD. *April* 2, 3

BY indenture, dated the 2d of *March*, 1683, it was witnessed that in consideration that *Thomas Rowney* had been elected to *Exeter* College, and out of gratitude, &c. and for the advancement and preferment of such learned and pious men, as from time to time should be of the seniority of the College, and to the intent that the church of *Wooton* might, as often as the same should become vacant, be supplied by an able and pious minister, to be presented by the College out of the number of the five senior fellows, according to orders of election into the College, and considering, that the College had no preferment for many of the senior fellows, who many times were forced to continue longer in the College than they were willing, whereby deserving young men, who were incapable of being elected fellows in the said College, were disappointed, *Thomas Rowney* granted to, and to the use of the rector and scholars of the College, and their successors for ever, the advowson, &c. of the said rectory of *Wooton*; upon trust, that they should from time to time, as often as the Church should become void during the life of *Rowney*, present such one of the said senior fellows as *Rowney* should nominate; and after his decease that they should, when the Rectory should become vacant, elect, nominate, and present, the senior fellow of the said College, according to priority of election, as aforesaid, for the time being, as should be actually fellow of the said College, and should not at such time as the said Church of *Wooton* should be void be presented, instituted, or inducted, into any other living or spiritual promotion whatsoever; and upon refusal of such senior fellow, then the next senior fellow, according to the priority of election into the college, qualified as aforesaid; and it was declared, that, in case the said Rector and scholars, and their successors, should not within two calendar months next after the avoidance and notice present such senior fellow as aforesaid, not having such living or spiritual promotion as aforesaid, or in case the said fellow or scholar should be presented by the said Rector, &c. and should not on or before *St. Peter's* day following such presentation

Qualification in the grant of a living, that the person to be presented, should not at such time as the Church should be void, "be presented, "ed, instituted, "ed, or inducted, into "any other "living," complied with by previous resignation of another living.

Resignation of a living, sent by the post to the Bishop, who indorsed and signed a memorandum of his acceptance, sufficient, though no public act.

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surrender his fellowship, to the intent that another might be chosen into the said fellowship the next election after such presentation, and in case such election should not be so made within such time, as aforesaid, then that the said rector, &c. should present such person as should be appointed by the heirs-male of *Rowney*, and, for default of such issue-male, then the next senior fellow or scholar, according to election, to the said Rectory; and it was further provided, that the Rector and scholars should take a bond in the penalty of 500*l.* from the person to be by them presented, conditioned for the resignation of his fellowship.

[338] The indenture contained a covenant on the part of the college, that they would, during the life of *Rowney*, from time to time, as the said Church should become vacant, present such person as he should appoint, as therein mentioned, and after his decease, as often as the Church should happen to be void, to nominate and present the senior fellow, as aforesaid, of the said College, for the time being, as should be then actually fellow of the said College, and not at that time have been presented or inducted into any other living or spiritual promotion whatsoever, and that the Rector and scholars would, in case such presentation, as aforesaid, should not be duly made within two calendar months after notice, or in case the fellow or scholar, so presented, should not within the time in the indenture surrender his fellowship, provided the said Church should not be *bonâ fide* litigious, nominate and appoint such person, as the heirs-male of *Rowney* should appoint; and in default of such issue-male, would present the next senior fellow.

The last incumbent of *Wooton*, died upon the 26th of *April* 1805. Upon the 23d of *January* 1805, *John Vye*, a senior fellow of *Exeter* college, and vicar *Merthoe*, in the county of *Devon*, by an instrument in the usual form, attested by a Notary Public, and directed to the Bishop of *Exeter*, expressed his resignation of that vicarage; and he appointed two other Notaries his Proctors, to exhibit such resignation to the Bishop.

The bill was filed by the next senior fellow of the college, who would be entitled to be presented to the rectory of *Wooton*, if *Mr. Vye* was not qualified; praying, that the College may be directed to present, and the Defendant, the Bishop of *Peterborough*, to institute, the Plaintiff to the [339] rectory of *Wooton*, and an injunction, to prevent the presentation and institution of *Mr. Vye*. The bill charged, that the resignation of the vicarage of *Merthoe* was not legal; as it was not delivered, or tendered, personally to the Bishop by the Defendant, or any person, as Proctor, named in the instrument, or other sufficient authority; but was sent to the Bishop by the post, or by some person, not duly authorised to act as Proctor; and ought not to have been

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accepted; and that the Bishop did not in fact accept the resignation, when it was received by him, nor at any time before the avoidance of the rectory of *Wooton*; and it was not accepted by him before a Notary, or any other witness: nor was it in any manner notified by the Bishop; and no communication was before the death of the incumbent of *Wooton* made to the proper officers of the Bishop, that such resignation had been offered or accepted: nor was any order made, that it should be registered: nor was any sequestration issued; nor any communication to the patrons of the vicarage of *Merthoe* of the vacancy, until after the avoidance of *Wooton*, that the Bishop of *Exeter* did not inform *Vye*, that he had accepted the resignation until after the avoidance of *Wooton*; and considered the paper he had received as of no importance, and laid it aside; and actually forgot, that it had been sent to him, until he was applied to after the avoidance of *Wooton*; when it was found among his waste papers.

The Plaintiff also insisted, that upon the true construction of the deed the College ought to present such senior fellow as had not been benefited by any other ecclesiastical preferment before or at the time of the avoidance of the Rectory of *Wooton*, and the intention of the donor was, that such persons should be presented as were otherwise unprovided for in the Church; and therefore *Vye*, having been before presented to a living, which he might have still continued to hold, was not qualified. [340]

The Defendants, the rector and scholars of the College, stated a paper, produced to them by the Defendant *Vye*, addressed to the Rector, signed by the Bishop of *Exeter*, and dated the 5th of *June* 1805; stating, that he had received from the Rev. *John Vye* a formal resignation of the living of *Merthoe* on the 22d of *February* 1805; and, that he accepted it on that day; and had since certified to the patrons the vacancy.

The Bishop of *Exeter*, who was made a Defendant, by his answer, admitted the circumstances, stated by the bill, as to the resignation of the living of *Merthoe*.

Mr. Richards and Mr. Hart, in support of the Motion for an Injunction.—Resignation, without acceptance by the Bishop, is nothing. The Defendant, *Mr. Vye*, continued apparently the Vicar of the parish; serving the Church personally, and by his Curate. There was no resignation in law; and therefore no vacancy. The Bishop cannot be compelled to accept a resignation. That the Church being once full, is an act of sound discretion. It is of extreme importance, that some unequivocal act should be done; as this may be liable to abuse, though there is none certainly in this instance. Upon the construction of this instrument it must be taken, that the object was to provide for some fel-

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low, who had no benefice before; not, that a fellow by avoiding another living should be capable of receiving this. The intention was to provide for those fellows, who remained in the College unbeneficed. The case, that * has been put by your Lordship, is very strong: a fellow looking forward to this object; refusing therefore a living from a foreign patron; and, when the incumbent is at the point of death, another, of higher seniority in the College, vacating his living with a view to this. There is no information to be found as to the mode of resignation, so as to bind all parties, the incumbent, the patron, and the ordinary. The incumbent ought to make public, as far as he can, that he has ceased to be the incumbent. In this case the Bishop put the resignation aside; and no notice was taken of it.

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The Solicitor-General and Mr. Leach, for the Defendant Vye.—The right of the Bishop, if he pleases, to refuse to accept the resignation, may be admitted. There is no doubt upon the construction, that a person, not having a benefice at the time, is qualified. According to the Plaintiff's argument presentation, though not followed by institution, would be sufficient. The security against abuse is, that the Bishop will inquire into the cause of resignation, before he accepts it; and under circumstances, such as are supposed in the case put by your Lordship, will refuse it. It has never been decided, or even alleged, that any particular form is necessary, in which the resignation must be accepted. It is sufficient, that the acceptance is clear; and in this instance the acceptance is clear, even if that memorandum by the Bishop had not existed, by the statement in answer to the question of *Vye*, that if he would send the resignation, it would be accepted: and there is an actual resignation, attested by a Notary Public. In the case of *The Marchioness of Rockingham* v. *Griffith* (*a*) the point was made; even supposing the Bishop to remain silent: but in this case he has not only intimated, that he would accept, but his acceptance is expressed in writing; and, according to the Bishop's answer, immediately on the receipt of the resignation. The resignation was deposited with the Bishop, as a public officer. The Court will not presume, that it was destroyed. Public notice by the Bishop is necessary only for the purpose of taking advantage of a lapse. The acts of the Defendant, after his resignation were nothing more than that, having demised his tithes, he received the whole rent, in order to hand over a portion of it to his successor.

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The Lord CHANCELLOR.—If I were called upon now to decide finally upon this subject, my opinion would be against

(*a*) 2 *Burn Ec. Law*, 316, Tit. Resignation. See also *Gibs.* 822, 823

the Plaintiff. Upon the construction of the deed, the intention, when this living was given to the College, was, that it should be held singly, and not as a plurality. The grantor looked forward to the promotion of the junior fellows of this College; and was desirous that this living should go in the first instance to the senior fellow, who had no promotion; and so in succession; in order to clear the way for the younger part of the community. His meaning, by the expressions he has used was, that the senior fellow should have this, provided another Church was not full of that person. The expression is not the best that the grantor could have used. He could not mean an instant presentation, I agree: but he does not describe the object, as a person who at any time before the vacancy had been presented. The expression is, "who should not at such time as the said "Church of *Wooton* should be void, be presented, institu- "ted, or inducted." The construction, that presentation alone, without institution or induction, should be a disqualification of a person, fit in other respects, would be very harsh. The best construction would be, that, if in the other Church he had nothing at the time, but the living was utterly gone from him, and his presentation, institution, and induction, avoided, he would have been eligible.

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Another point is of very considerable importance; though I have no difficulty in saying, that my opinion upon that is, that the Church was void at the time; and there can hardly be more materials for judgment than there are now. The Bishop of *Exeter* is not a necessary party. He would be a witness upon the trial. The answer of the Bishop was, that he would accept the resignation; and afterwards a formal, distinct, independent, resignation was made; but was not formally communicated to the Bishop: nor was it necessary: but it was transmitted to him by the post. Acceptance followed. The Bishop wrote his acceptance upon it; and signed it with all the formality necessary to give it effect. It was not called for. Nothing was done upon it, so as to give it publicity, until after the vacancy. There was evidently no collusion: but the same forgetfulness remained; the Bishop not recollecting, that the resignation had been tendered to him.

A witness not to be a party.

The only circumstance, that makes an impression upon me is, that this is not, and ultimately may not be, a question between the Bishop and the patron; as to what the Bishop ought to do, after having given his acceptance; though he had not notified it, or granted a sequestration, as he ought. He certainly could not, as between him and the patron, insist upon a lapse. But there is another party, who has a right to insist, that, whatever may be the fair and just intention, however the resignation may have been tendered and accepted, however as between the incumbent, the pa-

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tron, and the Bishop, it may not be binding, that party may say, he is entitled, as senior fellow, to stand in the place of the other, unless to all legal intents and purposes, in form as well as substance, that living is void. Though upon the authority that has been referred to, I should say, it was, I wish to look a little more into that. Taking that to be a binding authority, from the time of formal acceptation, the Church is void to all legal intents and purposes; and, if that is so, and the construction of the deed is, as I have stated, the Defendant *Vye* was eligible. But the question is, whether a third party has a right to insist, however it may stand between the incumbent, patron, and ordinary, that this Church was absolutely void, and whether it was so at the time of the vacancy; when no one was apprised of the resignation: the Bishop having totally forgot, that any act was done; and the party himself did not consider the Church void: continuing to do the duty and receive the emoluments until the very time, when the controversy arose: the acceptance being unknown to him, though perhaps he might rest upon the promise of the Bishop.

April 3.

The Lord CHANCELLOR.—I continue of the opinion I expressed, as to the first question, upon the construction of the indenture. There can be no other construction than this; that, if the Church of *Merthoe* was at the time of the avoidance of the Church of *Wooton* vacant by the Bishop's acceptance of the resignation, the Defendant *Vye* not only
[345] was eligible, but had a right, as senior fellow of the college, to be the object of the grantor's bounty.

The second question is, whether there was a resignation duly accepted by the Bishop; so as to produce the effect, that the Church of *Merthoe* was no longer full of this person, but it was, as if he had never been presented, instituted, or inducted. It appears, that the Defendant *Vye* appeared before a Notary Public; and in the most emphatical, and, I take it, the usual words, expressed his resignation; and upon the back is the attestation. There is but one part of this instrument, that could leave any doubt upon my mind: that is, the addition, that, to give his resignation full effect, he nominates two other Notaries Public his proctors or substitutes to exhibit his resignation to the Bishop. The only doubt arises upon this; that having made the resignation before a Notary, duly qualified to receive it, the Defendant did not leave it to him: nor did he mean himself to carry it to the Bishop: but he constitutes two other Notaries to signify it to the Bishop. I found, however, upon conversing with a person of great eminence

Acceptance by the Bishop of resignation not a judicial, but a domestic, act.

in the Ecclesiastical Court, that this act of the Bishop is considered not a judicial, but a domestic, act: the law confiding to him, that he will not permit resignation for improper purposes. The act is done in *Camera*; requiring no registration. The Bishop, in his answer to the first intimation of a wish to resign, communicated his ready acceptance for the reasons given to him upon that communication of the intention; stating, that he wrote his memorandum of acceptance. The resignation was tendered to him. The Bishop, if he had any reason to suppose, that it came to him surreptitiously, if he thought it came without any intention of that person, ought to have satisfied himself, that it came from him. But it now appears, that it did come from him by the post; and, according to the practice of the Ecclesiastical Court, if the party comes into Court, and does any act himself, there is an end of the power given to the other: the object of which is only to enable that person to act for him in his absence; not preventing the original act by himself.

Therefore I cannot permit this injunction to go.

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HEYES v. EXETER COLLEGE, OXFORD

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Practice in the Ecclesiastical Court, that the party coming into Court, and doing any act himself, vacates a power given to another to act for him.

Ex parte HANSON.

April 19. 22.

Set-off in Bankruptcy of a separate debt from the estate against a joint debt to it, and liberty to prove the balance under the Commission. (1)

AT the time of the Bankruptcy of *Castells* and *Powell*, *Hanson* and *Williamson* were indebted to them in a joint bond: the former as principal, the latter as surety; and *Hanson* was a creditor upon them, on his separate account, to an amount exceeding the bond. The Assignees having brought an action, *Hanson* presented a petition; praying, that he may be allowed to set-off, and to prove the balance.

The Solicitor-General, and Mr. Cooke, in support of the Petition, admitting, there can be no set-off at Law between joint and separate debts, insisted upon the right to set off upon equitable principles; as in *Ex parte Stephens*. (*a*)

Mr. Richards, and Mr. Heald, for the Assignees, argued, that, generally speaking, it is equally clear in Equity as at Law, that a joint debt cannot be set off against a separate debt; distinguishing the case cited, as turning upon the

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(*a*) *Ante*, vol. xi. 24.

(1) See *Dale et al.* v. *Cooke*, 4 Johns. Cha. Rep. 11, and the *American*, and *English*, cases there cited and remarked upon by the Chancellor. See also *Duncan* v. *Lyon*, 3 Johns. Cha. Rep. 351.

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fraud; the circumstances being considered as matter of relief.

The Solicitor-General, in Reply.—It is true, the case *Ex parte Stephens* was decided upon equitable grounds, *viz.* the fraud: Equity being administered in Bankruptcy. But the only effect of the fraud was to constitute a debt from one party to another; and the circumstance, that one of the demands had its origin in fraud, could not make any difference upon the right of set-off. In that case the claim to set-off stood under very different circumstances: the petitioner, the sister, being the surety; and the brother the principal: yet it was allowed. This petition is by the principal. The surety has a right to be relieved by the principal; and is entitled also to the benefit of all the securities the creditor has in his hands. So he has a right to money in the hands of the creditor; and, if *Castell* and *Powell* had continued solvent, the surety might have filed a bill against them, claiming the application of that money. The consequence is necessary; that he has a right in the Bankruptcy to have it taken as part payment of the joint debt.

April 22.

The Lord CHANCELLOR.—The question upon this petition is, whether the petitioner, having a separate demand against the estate of the Bankrupts, can set that off against the joint debt of himself and *Williamson*, for which an action has been brought by the Assignees, and whether I ought to prevent that action; *Hanson's* separate demand being larger than the joint debt; and permit him to stand as a creditor for the surplus of what is due to him upon his separate account. It is not necessary, that I should build the judgment I am to deliver upon the case that was cited, *Ex parte Stephens*. (*a*) It is not necessary to go near so far under the circumstances of this case. What appears to have had great effect upon Lord *Eldon* is, that the reason, that induced *Miss Stephens* to be security for her brother, was, that she considered herself a creditor of these Bankers, and therefore that she could make use of that fund in their hands for her own security, in case her brother should fall under any embarrassment. The difficulty was this. The Assignees of the Bankrupts sued the brother only, not both; and, having a clear demand against him for money actually advanced, the Lord *Chancellor*, exercising in Bankruptcy the double jurisdiction, equitable as well as legal, would not permit them to sue the brother, as they had defrauded the sister. When it may be necessary to go that length, there can be no better authority than that eminent, learned,

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Jurisdiction in Bankruptcy, equitable as well as legal.

(*a*) *Ante*, vol. vi. 21.

and experienced Judge. But in this case I am not obliged to do more than Courts of Equity were in the habit of doing, before the Statute of Set-off existed; which Statute was made only to prevent circuity. Suppose the Bankruptcy had not occurred. A plea of set-off could not have been put in to an action by the Bankers: but the moment they obtained judgment *Hanson* would have brought an action; and, if the surety had paid the joint debt, would have repaid him by the money recovered in that action: if *Hanson* himself had paid it, he would then have been reimbursed; and, if they had paid in moieties, they would have divided it. So the thing would have been just as if no action had been brought. Without the aid therefore of the extraordinary principle of fraud, which governed the case *Ex parte Stephens*, (*a*) there is a clear principle, that decides this case; that Assignees in Bankruptcy take, subject to all equities attaching upon the Bankrupt; and, as the condition of the Bankrupts, if they had continued solvent, would as between them and these persons, be such as I have represented, that must be the condition of the Assignees.

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Assignees subject to all Equities, attaching upon the Bankrupt.

The order upon this petition must therefore be that the petitioner shall be at liberty to set off so much of the money due to him from the estate of the Bankrupts upon his separate account, as may be necessary to discharge the joint debt from him and *Hillamson*, and that he may prove the residue under the Commission

(*a*) *Ante*, vol. xi. 24

Ex parte HARTOP. *April* 19. 22.

THIS petition was presented by the messenger under a Commission of Bankrupt, upon the petition of *George Sanders*; praying, that the Solicitor, who sued out the commission, or the petitioning creditor, or one of them, may pay to the petitioner the sum of 26*l.* 13*s.* the balance due upon his bill of fees, and also the sum of 183*l.*, paid by him under an award for damages and costs in an action of trespass brought against him: the Bankruptcy not being established: and the Commission being superseded; and the petitioning creditor being absconded. The petitioner had

Jurisdiction between officers; as between the Messenger and Solicitor in Bankruptcy.

Commission of Bankruptcy superseded.

the petitioning creditor absconding. The Messenger, having recovered part of his demand from him, was permitted to bring an action against the Solicitor for the residue and damages and costs, in an action against him, acting under the Commission.

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sued the petitioning creditor; and obtained from him payment in part of his bill.

Ex parte HARTOP.

The Solicitor-General, and Mr. Cullen, in support of the Petition.

Mr. Richards, and Mr. Hart, for the Solicitor.—The petitioner has his remedy at Law; and there is no jurisdiction here. In *Ex parte Nixon* a petition of this sort was dismissed with costs. The Messenger under a Commission of Bankruptcy is as much an officer, acting under the authority of the Lord *Chancellor*, as the Solicitor. The demand is made upon the agent: the principal having failed; to whom the petitioner applied first, and obtained payment in part. In *Ex parte Nixon* the application for payment was made to the Solicitor in the first instance. Up to the time of the choice of Assignees the proper client of the messenger is the petitioning creditor; and afterwards the Assignees: *Ex parte Hartop.* (*a*) There is no personal undertaking by the Solicitor.

The Solicitor-General, in Reply.—There can be no doubt of the jurisdiction; and that orders may be made in Bankruptcy after the commission superseded. The jurisdiction over the officers of the Court, the Messenger and Solicitor, is clear. Between these parties the Court has a right to interfere. The case *Ex parte Hartop* went much further. The Solicitor also had absconded in that instance. The fraud was immaterial: the persons, against whom the order was made, not being parties to the fraud. A stronger case
[351] cannot be stated: the Messenger having no choice; being the ministerial officer only of the Commissioners; bound instantly to obey their warrant. This proves the jurisdiction, after the Commission superseded, and as against strangers, not officers of the Court. This has no analogy to the common case of an agent, giving up his principal. The Messenger does not act upon the responsibility of the petitioning creditor; does not know, who he is. If a Solicitor will take out a Commission so rashly, that there is no petitioning creditor's debt, no effects, no Bankruptcy, is a ministerial officer, having no discretion, bound to do the act under the penalty of a contempt, to do all this upon his own responsibility? Is he to look only to the petitioning creditor, whom he does not know; but who is the immediate client of the Solicitor? Can the Solicitor, bound to know all the circumstances, refer the Messenger to that person, whom he does not know? It would not be proper to leave to an action this question, as to the consequence of acts by an officer of your Lordship, sitting in a domestic forum, between two of your officers.

(*a*) *Ante*, vol. ix. 109.

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Ex parte HARROP.

In *ex parte Nixon* under the circumstances it was not necessary to decide these points: nor were they decided. The Messenger had acted in several Commissions of Bankruptcy, sued out by the same Solicitor. The petition was presented, and was entitled, in those Bankruptcies; and the petitioner, instead of getting his fees taxed immediately upon the choice of Assignees and the authority of the commissioners, suffered his demand to rest, until the Statute of Limitations had run: the order directing, that the Solicitor shall not set up the Statute of Limitations against an action. It was a petition in a variety of Commissions; and in effect a bill for several accounts by a person, claiming a remedy for his own *laches*. He ought to have applied in each Commission immediately upon delivering up the effects in his possession to the Assignees. In *ex parte Hurtop (a)* Lord *Eldon* thought it so essential to support the Messenger, that his Lordship made Assignees, in no respect culpable, pay all, that was incurred subsequent to the choice of Assignees.

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The Lord CHANCELLOR.—This petition has two very important objects, 1st, as it regards the justice of this demand: 2dly, as to the jurisdiction to give relief to the parties, if they are in a condition to have it any where. The prayer of the petition is material. not, that the Solicitor only may pay, but, that either he or petitioning creditor, or one of them, shall pay the residue of the petitioner's bill, as messenger, and a further sum composed of damages and costs, paid by the petitioner under an award in an action brought against him.

No rule of law is better ascertained, or stands upon a stronger foundation, than this, that, where an agent names his principal, the principal is responsible: not the agent: but, for the application of that rule, the agent must name his principal as the person to be responsible. In the common case of an upholsterer, employed to furnish a house: dealing himself in only one branch of business, he applies to other persons to furnish those articles, in which he does not deal. Those persons know, the house is mine. That is expressly stated to them. But it does not follow, that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case. A person instructs an Attorney to bring an action; who employs his own stationer, generally employed by him. The client has nothing to do with the stationer, if the Attorney becomes insolvent. The client pays the Attorney. The stationer therefore has no remedy against the client.

Agent not responsible, if he names his principal, as the person to be responsible.

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This petitioner insists, that the Solicitor must be taken to be the person employing him; to whom he is to look;

(a) *Ante*, vol. ix. 109.

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not the petitioning creditor. The Solicitor, undertaking to sue out the Commission, goes to his own Messenger; who, being employed by the Solicitor, has no remedy against the petitioning creditor. But this petitioner appears to me to have decided this for himself; having sued *Sanders*, the petitioning creditor; and having obtained a note from him; which was paid. What colour was there for proceeding against him, the Solicitor being the original undertaker; and no presence of a joint undertaking? That objection, that the Solicitor employed the Messenger, the petitioning creditor not going near him, but being a total stranger, the messenger therefore being to look to the Solicitor only, does not lie here: the petitioner having considered the petitioning creditor as his debtor; which could not be, if the Messenger had been employed by the Solicitor. It is not necessary therefore to decide the general question.

As to the jurisdiction, I should regret to find, I have no jurisdiction. The party suing out a Commission under the authority of the Great Seal, employing the Messenger, either himself, or by his Solicitor, to give effect, giving a bond to the great seal, and responsible to the Great Seal for the due prosecution of the Commission, I have no doubt of the jurisdiction. The Solicitor, if responsible in any degree,

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will be responsible, not only for the fees, but also for all the consequences; as it was his duty to direct the Messenger to withdraw; for I will not put the Messenger in a situation of such responsibility. The Solicitor must also account, if he has any money of *Sanders*'s in his hands. Let him make an affidavit as to that.

April 23.

The Lord CHANCELLOR.—The point of jurisdiction is clear. Taking it to be admitted, or established, that a Solicitor takes out a Commission of Bankruptcy, or does any other act in the administration of the justice of the Court, and, to carry into effect that process, whether a Commission of Bankruptcy, or of any other description, employs a person, who is an officer of the Court, who has a demand upon him, specific and liquidated, or capable of being ascertained by taxation, I would compel the Solicitor to pay that money, as the Courts of Law constantly compel Attorneys to pay money, manifestly due from them to persons engaged in executing the business of the Court. The difficulty is, that this demand cannot be clearly ascertained upon affidavit; but ought to be the subject of an action; which this petitioner may bring against the Solicitor.

If it was necessary to give an opinion upon the abstract question, independent of the circumstances of this case,

which is embarrassed by the note taken from the petitioning creditor by the petitioner, there is, I think, great reason to suppose the Solicitor liable in general, upon this ground. He is applied to by a person, proposing to be the petitioning creditor in a Commission of Bankruptcy, perhaps at a considerable distance. The Messenger has no means of informing himself about that person and his solvency. The Solicitor is bound by duty as well as interest to see, that the subject is proper for a Commission, that the party is solvent; and that under all the circumstances the Commission ought to be sued out; and he looks to his principal.

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Ex parte Harrop.

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MORSE *v.* ROYAL. (1)

February 28
March 1, 3, 4, 6, 8.

Purchase by a trustee from the *cestuy que trust*, established under circumstances; with confirmation and acquiescence. (2) Answer of one Defendant not evidence against another. (3) As to the answer of a mere trustee, against whom the Plaintiff does not desire a personal decree. *Quære.*

THE object of this bill was to set aside a purchase, by a trustee under the following circumstances.

John Morse died in 1781, seised and possessed of considerable real and personal estates in the *West Indies*, which by his will he gave to his two sons-in-law *Vanheylin* and *Green*, and *Mitchell*, whom he also appointed executors; upon trust for the payment of debts, and subject thereto principally for his natural son *Green* was also one of the residuary legatees, and had been the partner of the testator and his consignee. Soon after the testator's death, *Vanheylin*, who had been his agent in the *West Indies*, came to *England*; and the original contract took place at the end of the year 1784, and the beginning of 1785: the deeds bearing date in *December*, 1784, and the 7th of *January* following, in consideration of 7500*l.* which sum was paid. The testator's son at the time he entered into this contract was about the age of 25, a lieutenant in the Horse Guards. Some time afterwards, upon the representation of *Morse*, that the purchase was at an under-value, another treaty commenced for a further consideration, to be paid to *Morse*; to which *Vanheylin* at length agreed; and another deed was executed, bearing date the 17th of *February*, 1790, by which *Morse* was to receive the further sum of 7500*l.*, payable by instalments: the answer representing, that the amount was fixed by the arbitration of *Green*; to whom *Vanheylin* proposed to refer it; and who awarded the sum of 15,000*l.*

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(1) Cited, and remarked upon, 2 Johns. Cha. Rep. 265. 4 Desaus. Cha. Rep. 694.

(2) See the note to *Whichcote* v. *Lawrence*, *ante*, vol. iii. 740.

(3) *Leeds* v. *Marine Ins. Co. of Alexandria*, 2 Wheaton, 380. But the rule does not apply to a case where all the Defendants are proved to be partners in the same transaction. *Clark's Adm.* v. *Van Riemsdyk*, 9 Cranch, 153.

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as the value. Of that sum part only was received by *Morse*. *Vanheylin* becoming insolvent; and *Morse* taking a dividend with his other creditors for what remained due to him on that account; having previously brought an action; and resisted an injunction. The bill was filed after the death of *Vanheylin* against *Green* and *Mitchell*, his executors, and against his daughter *Mrs. Smith*, as heir at law and residuary legatee; suggesting inadequacy of consideration, fraudulent advantage taken by *Vanheylin* of his situation, as trustee, &c.; and that the recitals in the deed of 1790, as to the circumstances of the arbitration by *Green*, were false, and praying that the purchase by *Vanheylin* may be set aside; that the trusts of *Morse's* will may be executed; that accounts may be directed, and the property applied accordingly; and that the residue, after payment of the debts and legacies, may be divided between the Plaintiff and *Green*, &c. according to their respective interests. The Defendants, *Smith* and his wife, relied principally upon the circumstances, that the purchase was proposed and pressed upon *Vanheylin* by *Morse*: who said he was determined to sell, and would put it up at *Garraway's*; and had attempted to sell to other persons; that there was no evidence of distress: that the title of *Morse* was not clear; and was actually in litigation upon an appeal to the Privy Council from a judgment in the *West Indies*, in his favour upon a bill filed in 1788: the objection arising under a Colonial Act of Assembly, restraining devises in favour of the children of negroes or mulattoes, that the value was fixed by the arbitration of *Green*, and the suit was not instituted until after the death of *Vanheylin*. *Green* also died,

[357] before the cause was heard; and the suit was revived against his representatives.

The Plaintiff was proceeding to read the answer of *Mitchell* and *Green*; to which an objection was taken by the Defendants

The Solicitor-General, Mr. Alexander, and Mr. Leach, for the Defendants Smith and his Wife, in support of the Objection.—The answer of the trustee cannot be read against the *cestuy que trust*. The only instance of reading the answer of executors is, where they are the only parties. But, when in cases of difficulty and importance the *cestuy que trust* is brought before the Court, the executor is in the situation of any other trustee; having no interest to attend to: the *cestuy que trust* being himself before the Court. The rule, that the answer of one Defendant cannot be read against another, is without exception. The reason of that rule is, that there is no opportunity for cross-examination. The only object of this suit is to affect the *cestuy que trust*; and for that purpose it is proposed to read the answer of the trustee. The residuary legatee being made a

party, the executor might have been examined as a witness.

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Mr. Richards, for the Defendants, the Representatives of Green.—The evidence ought not to be read with a view to obtain a decree against the Defendant *Green* personally. Where an executor is merely a trustee for others, and the subject of the question is property, in which the interest of residuary legatees is concerned, it is not unusual to direct the cause to stand over, that they may be made parties; and may sustain their own case. Where the Plaintiff therefore brings before the Court the persons substantially interested, not relying upon the case, merely as against the executor, he is merely a formal party; has only to state the facts, as to which he is interrogated, and has nothing to do with the disputes between the parties interested. As to real estate, the rule is different; but the principle the same: the *cestuy que trust* must be brought before the Court, as well as the trustee; who is nothing more than a mere formal party, and may be examined as a witness. The Plaintiff, having made his election, can have a decree only against the residuary legatee, whom he has brought before the Court.

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Mr. Perceval, Mr. Hart, and Mr Bell, for the Plaintiff.—This is not the case of a mere naked trustee; who, if made a Defendant, might be examined as a witness against other Defendants. This executor could not be examined against the *cestuy que trust;* and therefore his answer is necessary; as the Plaintiff proposes to use it. The object of the suit is to set aside the contract of the testator of this executor. Could that person by appointing, as his executor, the only witness to the case, to be made against him, deprive the Plaintiff of all his evidence? Relief against the assets of *Vanheylin* could not be obtained without bringing the executor before the Court, to discover what had been received by him, and by the testator, under the contract which is impeached. The executors being necessarily made Defendants, as it was necessary to have a decree against them, the Plaintiff could not examine them against the other Defendants; *Fotherby* v. *Pate.* (*a*) As to the objection from the interest of *Green*, in the demand against *Vanheylin's* estate, as being a residuary legatee of *Morse*, whatever may be the complication of *Green's* interests, he must be dealt with, as executor of *Vanheylin;* and the account must be taken against him. Though a Plaintiff, seeking relief against assets, may omit one of two executors, who has not proved the will; if both have proved, it is absolutely necessary that both should be made parties; if not, the Plaintiff, aware that one of the executors, his friend, had a large balance in his hands, might sue the

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(*a*) 3 *Atk.* 603.

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other. The only exception to the rule, that executors must be sued jointly, is, where an executor has not proved. In *Bowyer* v. *Covert* (*b*) the Plaintiff alleging, that he did not know who was the other executor, prayed a discovery as to that from the Defendant; and a demurrer was overruled. If, though the executor is not interested in the dispute, he alone knows the facts, upon which the right as between others turns, the Plaintiff may examine him; and, having obtained that examination, may have a decree against him to transfer the property, according to the rights, so discovered. The object of this suit is to obtain a great portion of property from *Vanheylin's* executors upon the ground, that, instead of performing his trust, he had converted to his own use both the real and personal estate, which was the subject of it. The executors had to pay debts, still unsatisfied, to a considerable amount. No effect therefore could have been obtained by making the residuary legatee alone a party: the interest of all the creditors and legatees of *Vanheylin*, which the executors are bound to protect, being in contention before the Court.

[360] Could the Plaintiff, inforcing a claim against the personal estate, examine the executor, standing precisely in the place of the testator himself? Then, could the testator by making the only witness to the particular transaction his executor prevent the relief?

The Solicitor-General, in Reply.—The question, whether this answer can be read against the residuary legatee, or, whether it can be read against the executor *Green* himself, is the same: as the decree, though in form against the executor, will be substantially against the residuary legatee; to whom he is to account for the assets; being not in any respect personally liable, but as a mere trustee, holding her property in his hands. This answer must be offered to the Court, either as evidence, or as an admission upon the record. In either view it cannot be received without a violation of established principles. First, it is liable to objection, as evidence *ex parte*. The residuary legatee has no opportunity of cross examination; and until the cause is heard, has not even the means of knowing, that such evidence has been given. Secondly, such evidence would be liable to objection at Law; and in the shape of deposition would be suppressed: the questions, as expressed in the bill, being necessarily leading. The Plaintiff tenders to the heir and residuary legatee an issue upon every fact alleged by the bill. Her answer denies the facts, constituting the supposed fraud. Issue is regularly joined between them; and then another part of the record is offered; amounting to an admission upon the record, the answer of another

(*a*) 1 *Vern.* 95.

Defendant, who did not take issue upon the facts, but admits them all. Can this Defendant be bound by that admission? Can a short answer, perhaps by a person friendly to the Plaintiff, admitting every thing, have this effect? The consequences of such a practice prove it to be most irrational and absurd. The answers coming in at different times; issue may be joined upon the first, that comes in. Suppose *Mrs. Smith's* answer had come in, a replication filed, witnesses examined; and, that she had at great expense proved, that *Green* had examined all these accounts, and other circumstances, repelling the imputation of fraud; and *Green* afterwards should by his answer admit, that he had not examined the accounts, and the other allegations; which would put an end to the case. Though the Plaintiff might be deprived of the evidence of the witness, if he was made executor, that would not prevent the discovery in this Court. The point in *Fotherby* v. *Pate* (*a*) is only, that the executor cannot be a witness for the estate: that is, a witness for himself, which therefore cannot apply to this case, in which the object is to procure evidence from the executor against the estate. This answer is offered as evidence of a transaction, which took place long before *Green* was executor; when he was an arbitrator between *Vanheylin* and the Plaintiff in this suit: not to prove any thing done in the course of his office as executor, by which he might in that character bind the parties interested.

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The Lord CHANCELLOR.—As a general proposition, the answer of one Defendant is evidence against him; but cannot be evidence against another Defendant; who has no opportunity of cross-examining. Objections of this nature frequently occur at Law; where it is frequently necessary to hear what may produce considerable prejudice against persons who ought not to be implicated. In the administration of criminal justice, for instance, where parties unconnected are charged with a conspiracy, one may admit the whole charge as against all: his admission, though evidence against himself, is clearly no evidence against the others. So in trespass, where the Defendants may be found severally guilty, or not guilty, a witness may say, he heard one acknowledge, that he committed the act with the others. That is decisive against that one; and, as it is legitimate evidence against him, the Court must hear it; though it is no evidence against the others.

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In my view of this case, it is not necessary to determine whether a trustee, against whom the Plaintiff does not desire a personal decree, may be examined. My opinion is, that these answers may be read for the purpose, and only

(*a*) 3 *Atk.* 603.

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for the purpose, of showing, what funds came to these executors; what debts there were; the value of the estate, &c. But beyond that *Green* could not possibly be a witness; being interested in setting aside these deeds; standing in the double capacity; as executor of *Vanheylin*, and therefore a proper Defendant; but also taking an interest as legatee under the will of *Morse;* and on another ground; that these transactions took place before he was executor; and have no relation to his character, as executor. The answer, therefore, must be received as to the particulars I have mentioned; but will not be evidence to affect the other Defendants *Smith* and his wife, as to any collusion, or any thing, not done in the character of executors; particularly as to that reference to *Green* to fix the value; upon which the last transaction took place.

The answer was read.

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[363] *Mr. Perceval, Mr. Hart, and Mr. Bell, for the Plaintiff.*— Under the circumstances of this case this purchase cannot stand: a purchase by a trustee from the *cestuy que trust;* acting upon the representation of the trustee; who took advantage of the ignorance of the *cestuy que trust*, and the pressure of his circumstances; which, by the management of the trustee could be made more pressing; followed by what is called a deed of confirmation; containing false recitals: the party who sold not in possession; and under circumstances that made him not *sui juris:* the party purchasing in possession of the whole estate. Upon the relation between the parties, attended with such circumstances, a Court of Equity will not permit this purchase to stand. A trustee cannot purchase from his *cestuy que trust*, without perfectly informing him of the nature and value of the subject; opening his eyes, discharging himself from the situation of trustee, and placing himself in an adverse situation. The circumstance, that the money is not paid at the execution of the contract, is a material badge of fraud in these cases. As to the objection of delay; in many cases delay for a much longer period has been insisted upon in vain; as in *Beaumont* v. *Boultbee.* (*a*) So, in the late case of *Purcell* v. *M'Namara* all the deeds were swept away; though many acts of acquiescence were insisted on.

The peculiar protection, given by the Court to young heirs, is extended beyond the strict interpretation of that word; comprehending persons entitled to reversionary property from any quarter; persons treating with guardians;

(*a*) *Ante*, vol. v. 485. Vol. vii. 599.

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or those, who are in the nature of guardians; for it is not necessary, that they should be so strictly, if they possess property in the nature of guardians; *Sir John Barnardiston* v. *Lingood*. (a) *Gwynne* v. *Heaton*. (b) *Pierse* v. *Waring*. (c) The principle of the relief is not merely youth and inexperience; for any transaction, while the account remains unsettled, shall be set aside, as long as one party is in the power of the other. Another class of agreements, at which the Court looks with great jealousy, is that between trustees and *cestuy que trust*: a subject, upon which Lord *Eldon* states his opinion with great precision in *Gibson* v. *Jeyes*, (d) *ex parte Lacey*, (e) and *Coles* v. *Trecothick*; (f) that a trustee, before he can treat with his *cestuy que trust*, must discharge himself from the office of trustee; and communicate all the knowledge he has acquired. What Lord *Hardwicke* says in *Lord Chesterfield* v. *Janssen*, (g) is rational and sensible, with reference to the principle stated by Lord *Eldon*: that it is incumbent upon parties in such a situation to show, that all is fair and proper.

As to the doctrine of confirmation, the party must not remain in the situation in which he was when the imposition was originally practised upon him, whether that was a state of ignorance or distress. In *Cole* v. *Gibbons*, (h) *Cole* v. *Gibson*, (i) and *Taylour* v. *Redford*, (k) the ground upon which transactions of this description may be confirmed, appears. In *Lord Chesterfield* v. *Janssen*, (a) the Lord *Chancellor* and Judges held, that the party confirming should know all the circumstances; and should stand so unconnected with the preceding transaction as to have the complete power of determining, as upon an original act, whether he would do it, or not. In *Crowe* v. *Ballard*, (b) Lord *Thurlow* held clearly, that the confirmation could not be by an act done under the influence of the former transaction. *Cocking* v. *Pratt*; (c) and *Griffith* v. *Trapnell*, there cited; where, though the agreement had been confirmed by decree, it was upon a bill of review set aside. *Wiseman* v. *Beake* (d) is a strong authority. The relief is administered, not only for the sake of the individual, but upon grounds of public policy. [365]

The Solicitor-General, Mr. Alexander, and Mr. Leach, for the Defendants, Smith and his wife.—The law of this Court is not, that a trustee may not purchase from his *ces-*

(a) 2 *Atk.* 133. (b) 3 *Bro. C. C.* 1.
(c) Cited 1 *Ves.* 380. 2 *Ves.* 548. stated from the Register's book in *Mr. Cox's* Note, 1 *P. Wms.* 118. See *Hatch* v. *Hatch*, *ante*, vol. x. 292.
(d) *Ante*, vol. vi. 267. (e) *Ante*, vol. vi. 635.
(f) *Ante*, vol. ix. 234. (g) 1 *Atk.* 301. 2 *Ves.* 125.
(h) 3 *P. Wms.* 290. (i) 1 *Ves.* 503. (k) 2 *Ves.* 281.
(a) p. 365. 1 *Atk.* 301. 2 *Ves.* 125.
(b) p. 365. 3 *Bro. C. C.* 117. *ante*, vol. i. 215.
(c) p. 365. 1 *Ves.* 400. (d) p. 365. 2 *Vern.* 121.

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tuy que trust. It was never determined, that a contract should be set aside merely upon that point; and *Coles* v. *Trecothick* is an express decision to the contrary; and was not under any peculiar circumstances; except that *Trecothick* knew, that *Coles*, to whom he sold, was constituted a trustee for the sale of the estate; and consented to sell to him: yet it was held, that the contract should stand. It is true, the Court looks with great jealousy upon a contract between such parties; and it is incumbent upon the trustee, if a suit is instituted during his life, to prove, that the *cestuy que trust* knew, not only that he was selling to his
[366] trustee, but also, what he was selling; and that he had all the information the trustee could give him. That however is the law of the Court only where the transaction is impeached during the life of the trustee: imposing upon him the necessity of showing the purity of the transaction only where it is possible for him to do so; and a person, who by his delay has made that impossible, as in this instance, cannot expect the interference of the Court. The trustee, who alone knew, whether the information was given, and all the other circumstances, died, before the transaction was impeached. In such a case every thing is to be presumed against the Plaintiff, *viz.* that the trustee could have shown to the satisfaction of the Court all the circumstances relating to the Property, as well as the exact amount of it.

The circumstances of the subject of this trust must be taken into consideration. A sale immediately after the death of the testator would in the instance of a *West India* estate have been most destructive. A considerable part of the property consisted of debts; which could not be immediately paid. As to the objection, that the consideration was not immediately paid, the contract was to pay, not in ready money, but by instalments. A contract cannot be set aside merely upon the inadequacy of the consideration. The test, represented as Lord *Thurlow's*, (*a*) that the inequality must be so gross as to produce an exclamation, depending upon the particular disposition and temper of the Judge, cannot be just. This must also be considered with reference to the large premium upon remittances by bills payable in *London*; so that 100*l.*, paid in the island, will not be more than 75*l.* here: the casualties and fluctuation, to which pro-
[367] perty of this nature is liable; and the doubts as to *Morse's* title; subject to which *Vanheylin* purchased. All these circumstances must have great weight upon the question as to the adequacy of the consideration.

Then the transaction of 1790 is a complete confirmation. Contracts, that are considered as against public policy, are

(*a*) 1 *Bro. C. C.* 8. *Gwynne* v. *Heaton.*

to be laid out of view, not admitting confirmation; as marriage-brocage bonds, &c. But that doctrine is never applied to the case of a person, taking advantage of another in a bargain; and the case of trustee and *cestuy que trust* fall within that class. The Court has said, not that contracts between trustee and *cestuy que trust*, but that a sale by a trustee to himself shall be set aside on principles of public policy; without regard to the fairness of the transaction. The case of *Cole* v. *Gibbons*, (*a*) an extremely material case, determined by one of the greatest of your Lordship's predecessors, Lord *Talbot*, has established the law upon this subject. In this case, as in that, the proposition came from *Morse*, not from *Vanheylin*: and *Morse* had attempted to sell to other persons. That is an instance of a most extravagant bargain; advantage taken of extreme misery: circumstances, to which the original transaction in this case cannot be compared. The case, (*b*) before Lord *Cowper*, referred to in the note, is another instance of confirmation; where the first transaction was the effect of distress. *Mr. Cox* in his note states the accurate result, that the party must be fully apprised of his right to be relieved, &c. *Taylour* v. *Rochford* (*c*) has no application: the Act supposed to be a confirmation, being as much tainted by fraud as the original transaction. [368]

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In *Crowe* v. *Ballard* (*d*) Lord *Thurlow* did not mean, that there can be no confirmation, unless the original transaction is quite undone and annihilated. If that is the effect, there would be inconsistency in describing the second transaction as a confirmation. It is a new transaction. The case of *Beaumont* v. *Boultbee* (*e*) turned upon such particular circumstances, that it cannot be an authority; and was a case, not of confirmation, but of long acquiescence merely. *Purcell* v. *M'Namara* also depends upon a great variety of circumstances. If the party, aware, that he was deceived, and had a right to set aside the transaction, as he had not a knowledge of the accounts, upon mature deliberation chooses, in consideration of a further sum to say, he will not then look into the accounts, but will confirm that transaction, which he knows he may set aside, it will be impossible to impeach that confirmation: yet his eyes are not more open in the second transaction. He knows nothing of the accounts then; and does not look into them. Suppose this suit compromised: upon the same ground, the Plaintiff may come at a future time; alleging, that still he knows nothing of the accounts; and therefore is entitled to set aside the compromise. Is it possible to set aside this second transaction, five years afterwards; upon which

(*a*) 3 *P. Will.* 290. (*b*) 3 *P. Will.* 294 Note *E*
(*c*) 2 *Ves.* 281. (*d*) p. 368. 3 *Bro. C. C.* 117, *ante*, vol. i. 215
(*e*) p. 368. *Ante*, vol. v. 485. Vol. vii. 599.

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7500*l.* more is paid: the party five years older; a man of the world; guarded against transacting with trustees, and with this trustee particularly? If that can be done, there can be no confirmation. The consequences * of the delay must be considered: families acting upon their supposed rights; putting the property in settlement, and applying it to other occasions. The mischief extends far beyond the mere loss of evidence. Admitting the rule, requiring the trustee to give all information to the *cestuy que trust*, and to show that in a Court of Equity, the *laches* creates an exception. Upon that the presumption is the other way; and the *cestuy que trust* must show clearly by evidence, that a fraud has been committed. Upon *Green's* answer it must be presumed, either that *Morse* had examined the accounts, or, that *Vanheylin* supposed he had.

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Mr. Perceval, in Reply.—The rule is clear, that a trustee cannot buy from himself. The transaction does not vary his situation and character. He was trustee before; and he continues so. But it is not contended, that a trustee may not buy from his *cestuy que trust*. Such a transaction is however attended with great difficulty; and cannot prevail, except under such circumstances, with such guards and protection, accompanying the individual, that the trustee will be enabled, not merely to answer a case, to be made against him, but to show for himself, that he has done every thing, that his duty as trustee required. The cases before Lord *Eldon*, who with his great experience in the principles of this Court, felt extremely strong upon this point, *Gibson* v. *Jeyes* (*a*) *Ex parte Lacey*, (*b*) and *Coles* v. *Trecothick*, (*c*) contain in a short compass the principles, that are to be applied to this case. The Court must be satisfied, that all the duties of the character have been performed. It is upon him to show, that he has made the disclosure, and given the fullest consideration. The *cestuy que trust* has not to show the contrary. The reason of this protection is, not that the trustee actually has more knowledge than the *cestuy que trust*: but as he is in a situation, which may probably enable him to know more, the general rule is established, that he shall not deal, unless he shows distinctly, that he has done all this, and guarded the interest of the *cestuy que trust*, as he would have guarded it in a sale to a third person.

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The circumstances of *Coles* v. *Trecothick* (*a*) have no analogy to such a case as this. All the management of the sale was in *Mr. Trecothick*. It was a trust only in form: the trustees not interposing: in fact a sale by the *cestuy que trust* himself, having all means of knowledge: the trus-

(*a*) *Ante*, vol. vi. 267. (*b*) *Ante*, vol. vi. 625.
(*c*) *Ante*, vol. ix. 234. (*a*) p. 370. *Ante*, vol. ix. 234.

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tees having none. Yet the Lord *Chancellor* acknowledged, that it was a case most difficult to be made out. Trustees continually endeavour to get out of this rule, of which instances frequently occur; particularly upon trusts of *West India* estates evidence has not been produced of the youth of the Plaintiff, nor as to his distress. He had no probable source of wealth: a military officer, the natural son of a *West India* merchant; and this is met only by general evidence, that he was in easy circumstances; and kept a carriage afterwards.

As to the confirmation, in *Crane* v. *Ballard* (b) Lord *Thurlow* lays down the true principle, that, if a man gives a new bond under an idea that the old one may be enforced against him, there is no confirmation, as he is not in a [371] situation to be Master of himself. If that were not the principle, such person would be in a worse condition, than if the rule did not exist. The Court must therefore see, whether in this transaction of 1790 *Mouse* stood in this situation, that not only he, dealing with *Vanheppin*, asserted his right to be relieved from that bargain, but that *Vanheppin* acknowledged that. The result of the evidence is, that *Vanheppin* insisted upon the validity of the conveyance; holding over him the effect of the former bargain. This, therefore, is not within the rule, laid down by Lord *Thurlow*. There is no more foundation for the confirmation of 1790, than for the original contract of 1785. No offer appears to relinquish this bargain. These circumstances would not amount to a ratification, even if *Mouse* knew he was at liberty to relieve himself from the bargain; which however does not appear. The law upon this subject was not known at that period, as it is now. The conclusion is, that neither can the original contract be upheld, nor the confirmation: the recital being falsified; *viz.* that there was a reference to *Green* to settle what sum should be paid; and as to that, *Wiseman* v. *Beake* (a) is strong authority.

The Lord CHANCELLOR.—The authorities connected with this case are not many; and the principles are perfectly clear. One class of cases is, that of contracts that may be avoided, as being contrary to the policy of the law; which are interdicted for the wisest reasons. Of that kind are a * deed of gift, obtained by an Attorney while engaged in the business of the author of that gift; a deed by an heir, when of age, to his guardian, purchases of reversions from young heirs, when of age. The most remarkable case is purchase of a reversion from a young heir, a trustee selling to himself, set aside without evidence of fraud.

Contracts, contrary to the policy of the law, as a deed of gift by a client to his attorney, by an heir to his guardian, the

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(b) 3 *Bro. C. C.* 117. *ante*, vol. i. 215. See page 220.
(a) 2 *Vern.* 121.

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Wells v. *Middleton*; (a) in which Lord *Thurlow* said, *Middleton* deserved to be, and under other circumstances might have been, an object of that party's bounty; but the deed, taken by an Attorney, while he was the Attorney of the party, could not be supported without striking at the root of property; referring to *Walmsley* v. *Booth*, and *Sanderson* v. *Closse*: both cases of an Attorney.

To that class of cases I shall add the case of a trustee selling to himself. Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void. In the case of the Assignee or Solicitor under a Commission of Bankruptcy purchasing the property, in all these instances, there is no necessity for evidence: the contract is interdicted by the policy of the law. I have no difficulty in saying, I should not have regretted to have found, that the rule extended even to such a case as this. Finding, that there is so much difficulty in supporting a purchase by a trustee from the *cestuy que trust*, that the transaction ought to be guarded with that necessary degree of jealousy, running so near the verge, it might be better embraced under the policy of the law.

In *Gibson* v. *Jones*, (b) and *Ex parte Lacey*, (c) Lord
| 373 | *Eldon* appears to have stated, that to maintain a contract between trustee and *cestuy que trust*, the relation must be dissolved, or the parties must agree to take the characters of purchaser and vendor; that the rule does not preclude a new contract, dismissing the trustee from that character. If the relation is dissolved altogether, they cease to be trustee and *cestuy que trust*. But the language, in which Lord *Eldon* expresses himself in *Coles* v. *Trecothick* (d) sufficiently explains all, that was intended by those former passages. His Lordship in that case says, "a trustee may buy from "the *cestuy que trust*, provided there is a distinct and clear "contract, ascertained to be such after a jealous and scrupu- "lous examination of all the circumstances, that the *cestuy* "*que trust* intended the trustee should buy; and there is "no fraud, no concealment, no advantage taken, by the "trustee of information acquired by him in the character "of trustee." As to the effect of inadequacy of consideration, the principle is there put full as strong as I should be disposed to put it. If the Court can discover, that some advantage has been taken, some information acquired, which the other did not possess, though it is not to be precisely discovered, inadequacy, without going to the length

Effect of inadequacy of consideration towards constituting fraud.

(a) Cited by the Lord *Chancellor* from a MS. Cited by Lord *Eldon* *Chancellor*, *ante*, vol. ix. 294, in *Hatch* v. *Hatch*.
(b) *Ante*, vol. vi. 266. See page 277.
(c) *Ante*, vol. vi. 625. See page 626.
(d) p. 373. *Ante*, vol. ix. 234. see page 246.

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of requiring it to be such as shocks the conscience, will go a vast way to constitute fraud.

As to the doctrine of confirmation, it stands upon several authorities; where a man, having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him; allows his right to abrogate the contract; and enters into a plain, distinct, transaction of confirmation. But when the original fraud is clearly established by circumstances, not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence, as an act, done with all the deliberation, that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place.

Nature and effect of confirmation: clear evidence necessary; if fraud has been clearly established.

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As to the effect of length of time, where there is no bar by the Statute of Limitations, a Court of Equity will never lay down as a general proposition, that though the fact, that imposition has been practised, is established, the party is too late; and by the accident of the death of the person, who might have contradicted him, shall be deprived of his right to relief. The true operation of length of time is by way of evidence; and, acknowledging the rule as to dealings between a trustee and the *cestuy que trust*, and, that the transaction should be more narrowly watched than in the case of strangers, yet it is to be examined according to the rules of evidence; standing upon the eternal principles of justice; and recognized by the whole theory and practice of the law of *England*. Considered in that way, length of time may have some operation: in what degree depends upon the circumstances of this case; which are peculiar. Particular attention is due to the joint trust, in *Vanheylin*, *Mitchell*, and *Green*, owing therefore a joint duty; *Green* a partner with *Morse*, and consignee. At the date of the original contract, in 1785, *Morse* was an officer; and it does not appear, that he was in any particular distress. *Green*, with all the knowledge he must have had of the value of the real and personal estate, and who had married the sister of this young man, was made a co-trustee; in which respect this is much stronger than the case of a single trustee and *cestuy que trust*. The fair presumption from such circumstances is, that imposition would be avoided. The objection in the case, that has been cited, of an Attorney, having the party in his power, is obviated in a great degree, where there is another trustee, consenting; a person of this description; who derives no benefit from the contract. This is a peculiar feature in the cause. If *Green* were now living, and proved, that this transaction was a fraud, committed by *Vanheylin*, his testimony would

Effect of length of time, not as a bar to relief against fraud, but by way of evidence.

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not be entitled to any respect; the fraud, if any, being committed as much by him, as by *Vanheylin*. (1)

Another circumstance, deserving attention, is, who first made the proposition. This is not a trustee, looking round him, and fixing his eye upon this property, as increasing in value. It is in evidence, that *Morse* was determined to sell it; and, if he could not get what he wanted, that he would put it up at *Garraway's*, that he frequently teazed *Vanheylin* to purchase it; who was reluctant; but at last said, he would go the length of giving 5000*l*. The debts, due to the estate at that time, were above 113,000*l*.: in 1790 they were 118,000*l*.: debts from all sorts of people: at a great distance: liable to accident, from the situation, in the *West Indies*, where debts and estates are frequently sold upon terms, that at first have the appearance of fraud. There is nothing like *partium affectionis* here. Yet I do not join in any panegyric upon *Vanheylin's* conduct; though I may dismiss this bill, and I repeat, that I should not have been sorry to have found, that the rule reached this case. But this is a contract, that cannot be dissolved except upon legal principle.

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The effect of the transaction in 1790 is this. This gentleman, not a minor, not a lunatic, with his brother-in-law, and other assistance near him, finding, that this was a better thing than he imagined at the date of the contract in 1785, goes to *Vanheylin*, not charging him, as having committed a fraud, but applying as *cestuy que trust* to a person, who had gained an advantage, which a relation at least ought not to take; desiring, that, as the property had improved, either the contract should be dissolved, or *Vanheylin* should give him what it was then worth. An application was made to *Green*, as a common friend: each party standing upon his right: the Plaintiff insisting, that he should have more; but not on the ground of fraud: the other referring to the Plaintiff's own brother-in-law, standing in the same character as *Vanheylin:* a man, who cannot be supposed to have an interest to join in a breach of his trust, for the purpose of defrauding his brother-in-law, and throwing money into the hands of another person, with whom he does not appear to have been connected. There is no evidence of collusion with *Vanheylin* for that purpose.

The second transaction, in 1790, is in its circumstances nothing like another fraud, growing out of the former: the act of a man of full age; and all these circumstances within his reach and knowledge.

It does not rest there. At this time the Plaintiff had by no means a title to the estate; and it is plain, he was perfectly aware, that the infirmity of his title constituted one

(1) *Claiborne* v. *Parrish*, 2 Wash. Rep. 148.

of the considerations of the contract. That infirmity, resting upon the local law, stood upon a claim by no means contemptible; which was finally determined at the *Cockpit*, with great consideration, upon an appeal from the judgment obtained in *Jamaica*. 1806. Morse v. Royal.

The Plaintiff, so far from attempting to rescind what had passed, brought an action, standing upon his contract, for the remainder of the consideration. The Defendant did not, as in *Wiseman* v. *Beake*, (a) endeavour to draw him into a ratification; but came to this Court, to do what was dishonest certainly: saying, he had a right to the money, but there was a warranty in the contract of his title to the estate; and insisting, that, until it was seen, what became of *Edward Morse*'s claim, the action should be injoined. The Plaintiff, with complete knowledge of all the circumstances, (and he could not then be under the age of 30,) in his answer to that bill insists, that the Court should dissolve the injunction against him; and would have obtained the advantage of his suit, if not prevented by the insolvency of *Vanheythuysen*'s estate; from which he took a dividend, founded upon that contract the existence of which he now denies. Upon the case of *Wiseman* v. *Beake*, if that case is to be considered as an authority, I do not view this in the light of confirmation, but as repelling the evidence. [377]

The point upon the length of time is put thus: that I must shift the proof from the one to the other. I do not know, that I am to go that length. I am to see, that the transaction was fair, that no advantage was taken; that there was no concealment. Length of time operates only, as it does in the instance of rights of way and other incorporeal hereditaments, upon the infirmity attending all human testimony: where witnesses are suffered to die before the claim is made, much is to be presumed against it. Charters, and even an Act of Parliament, as Lord *Mansfield* says, have been presumed. (b) In the instance of an * Annuity, open to objection under the Act of Parliament, (a) the act being imperative, Lord *Rosslyn* considered the Court bound, notwithstanding the party had lain by. But Lord *Kenyon*'s opinion upon that was so different, that, where I pressed a case upon him, the party not having lain by, but the witness being dead, insisting, that the act imperatively bound the Court, the answer of Lord *Kenyon* was, that there was nothing in the Act, binding the Court to believe an affidavit, that could not receive contradiction. In *Symmons* v. *Mortimer* (b) also Lord *Kenyon* says, the length of time, which had elapsed since the granting of the Annuity, and the Defendant's having lain by till the death of the agent, by whom the business was negociated, and till all the evidence of the transaction, except what he himself

Effect of length of time, as evidence, in the instance of incorporeal hereditaments.

Charters and even an Act of Parliament presumed.

Effect of *laches* with reference to the Annuity Act.

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(a) 2 *Vern.* 121. (b) See *Hillary* v. *Waller*, *ante*, 239.
(a) p. 378. Stat. 17 *Geo.* 3. c. 26. (b) p. 378. *Hunt's Ann.* 75.

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had disclosed, was lost, might perhaps have been a sufficient answer to this application.

If *Vanheylin* was living, he might say, the Plaintiff had an account; and there were witnesses, who could prove the integrity of the transaction. How is it possible, that length of time shall not operate in this way; not to induce the Court to refuse to hear the Plaintiff, but that unfortunately without design he has put it out of the power of the Court to see the wrong with the distinctness that is necessary, in order to act.

As to granting an issue, the case could not be made out at Law. The evidence, the acquiescence, and the length of time are strong against the claim. *Green* is dead; and, if living, he could not upon any principle be admitted to say, a co-trustee and relation had been engaged in a scandalous collusion to defraud the Plaintiff.

Bill dismissed, without costs

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April 19

Ex parte GWYNNE.

Upon the Bankruptcy of the purchaser of a chattel, *viz.* timber felled, whether the vendor has a lien, and may prove the deficiency, *Query.*

As to the effect of taking away part of the property sold, and a payment on account, as waiving a breach of the condition of sale requiring it to be paid for before removal.

THE petitioner had sold, by auction, timber which had been felled upon his estate; and, by the conditions of sale, the purchaser was, upon being declared so, to give security for payment of the purchase-money at the time stipulated. That was not done: but the purchaser took away part of the timber, paid some money on account; and afterwards became Bankrupt. The petition prayed, that the timber, remaining upon the estate of the petitioner, may be sold; that the money produced by the sale may be paid to the petitioner in satisfaction of the sum remaining due under the contract, and that the petitioner may be at liberty to prove the residue under the Commission.

Mr. Cooke, in support of the Petition.—The circumstances of this case raise an equitable lien: *Snee* v. *Prescot.*(*a*) No difference occurs upon the circumstance, that part of the goods remains with the petitioner. In a case (*b*) before Lord *Loughborough* it was held, that, where part of the money is paid, still in the event of Bankruptcy, if the vendor has not parted with his property, he has a right to consider his contract valid, and may prove the difference. The case of stoppage *in transitu* does not resemble the case of lien in this respect: in the latter the owner has parted with his property; and some third person has the possession of it. But in those cases it has been determined, that not-

(*a*) 1 *Atk.* 245. (*b*) 31st *July*, 1800.

withstanding payment of part there may be a stoppage *in transitu*: *Hodgson* v. *Loy*, (c) *Feise* v. *Wray*. (d) In the former case Lord *Kenyon* *said, the question was not, whether the contract was to be rescinded, or not; but, if the vendor could get back the goods to his possession, he had an equitable lien. In *Feise* v. *Wray*, *Lawrence*, Justice, asks, (a) whether it is to be contended, that a one, to whom goods are consigned, accept bills, drawn by the consignor for the value, and afterwards becomes Bankrupt, before the bills are paid, in consequence of which the drawer is obliged to take up and satisfy the bills, yet the consignee is entitled to have the goods from the agent of the consignor, who stopped them, and observes, that the consignee is intitled to have the whole value, before he parts with the goods, and in case of a partial payment he, who obtains the legal possession, is entitled to keep it; and if the vendor has a right to stop the goods *in transitu*, and has stopped them, he has a lien on the goods, till the whole price be paid.

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The Lord CHANCELLOR.—Have you any case of an entire contract, a partial delivery, and stoppage of the remainder.

For the Petition.—*Salvergreen* v. *Hight*, (b) proves that proposition. There the contract being entire, and part delivered by the Captain without receiving the freight, Lord *Kenyon* held him to have a lien on what remained for the whole freight, including the freight of what had been delivered. So is *Dutt*, 99. b.

These cases proceed upon this ground, that the owner has a right to consider the contract as subsisting; and has a lien upon the part of the goods in his possession for the performance of that contract. There could be no lien, if the contract was rescinded. They could not therefore proceed upon that. The question of lien must always arise upon a subsisting contract. Suppose part of the property was delivered, and the remainder was to be sent by a carrier: and in the interval a Bankruptcy takes place: might not the owner stop *in transitu*, and, if he did, could it be contended, that he should not be paid for what had been delivered? Real property cannot upon principle be distinguished from personal with reference to such a contract; and there is no doubt that the vendor of real estate, having received part, has a lien in the event of Bankruptcy, giving him a right to satisfaction by a sale, and to prove the deficiency as a debt under the Commission. How can that be distinguished in this respect from a personal contract?

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(c) 7 *Term Rep.* 440. See page 445. (d) 3 *East*, 93.
(a) 3 *East*, 98. (b) Cited 6 *Ves.* 623.

1806.

Ex parte GWYNNE.

The Solicitor-General, for the Assignees.—The doctrine as to stopping *in transitu* is not applicable to this state of circumstances; proceeding upon the ground, that it is not too late to keep the property, and rescind the contract: so that the vendor shall not be considered as a creditor. But there is no case, in which a vendor, choosing still to be considered a creditor upon the estate of the vendee, can stop *in transitu*. In those cases the contract must be rescinded. The only question is, whether this is within the authority of *Bowles* v. *Rogers*. (*a*) For that purpose the petitioner must make out, that a contract for the sale of trees is of the same nature as a contract for the sale of real estate. It has been held, that it was not necessary, that a contract for the sale of timber should be in writing, as it was only a chattel. This timber is actually cut. The lien has always [382] been confined to real estate, as to which the right is clear upon *Pollexfen* v. *Moore*, (*a*) and many other cases. That is purely equitable doctrine, administered also in Bankruptcy; that the party may not be put to file a bill. But there is no instance of that lien in favour of the vendor of a personal chattel.

The Lord CHANCELLOR.—Is there any instance of delivery of the key of a warehouse; in order that the purchaser might take out at his own election what he had purchased, where, after part had been taken away, the purchaser became Bankrupt: could the vendor stop the remainder?

Mr. Cooke, in Reply.—In that case the delivery of the key would put an end to the right; the delivery of the key being a delivery of the whole. (1)

The Lord CHANCELLOR.—So it may be contended, that the access given for the purpose of taking away the property, is equivalent to delivery of a key. In *Hodgson* v. *Loy* (*b*) Lord *Kenyon* denies, that the cases as to stopping *in transitu* proceed upon the ground of rescinding the contract, and considers them as cases of equitable lien. There is a strong analogy between this case and *Bowles* v. *Rogers*: (*c*) except that the one is a case of real estate, the other personal. The difficulty I have at present is this. This timber, having been cut down, was lying upon the estate of the petitioner; and the Bankrupt, having, when solvent, purchased it, took away part. The liberty to go there, and take

Stoppage *in transitu* upon the ground of equitable lien, not of rescinding the contract.

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(*a*) 1 *Cooke's* Bank. Laws, 123.
(*a*) p. 382. 3 *Atk.* 272. See *Trimmer* v. *Bayne*, *ante*, vol. ix. 209.
(*b*) 7 *Term Rep.* 440. (*c*) 1 *Cooke's* Bank. Law, 123.

(1) *Wilkes* v. *Ferris*, 5 Johns. Rep. 335.

it away, is just as much as the delivery of a key. There is no instance of stopping *in transitu* where there has been delivery of part. My first impression is against this petition, which seems inconsistent; seeking to establish a lien, and yet to prove under the Commission.

1806.

Ex parte GWYNNE.

Vendor's lien a sale of real estate.

The Lord CHANCELLOR.—The difficulty I had upon this case still remains, and the point can be determined only by a Court of Law. Where the sale before the Bankruptcy has proceeded to the length, that either a total delivery has followed, or such a partial delivery, as both in Law and Equity prevents the stoppage *in transitu*, the property is vested in the purchaser; and then it is impossible to take it from the Assignees, who might bring trover. A further difficulty arises upon the clause, providing, that the purchaser, when declared, shall give security for payment of the purchase money at the time mentioned in the conditions. That security, which ought to have been given immediately, never was given. The purchaser therefore not having complied with the conditions of sale, this party was not bound to deliver the timber; and therefore the contract was abandoned, and the property did not pass to the purchaser. But after the time, at which he ought to have given security, which was immediately upon being declared purchaser, he took away part of the timber: whether by consent, or not, does not appear; and part of the purchase money was received upon account. That raises a material question at Law; whether that is not a waiver.

April 22.

No stopping *in transitu* after delivery of part.

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Therefore let the timber remaining upon the estate be sold, and an action of trover be brought by the Assignees against the petitioner: if the verdict is for the Plaintiffs, the money to be paid to them; and the petitioner must prove his whole debt: if for the Defendant, then, giving credit for the money produced by the sale, he may prove the residue.

1806.

April 18. 22.

Ex parte M'DOUGAL.

Order after the death of a lunatic for payment of a debt, *viz.* an Attorney's bill upon a retainer, over-reached by the lunacy; and no report of debts: if the petition is presented in the life of the lunatic.

But the debt must be established at Law. (1)

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THE Master disallowed a claim by the petitioner for his bill of costs, as Attorney for a lunatic: the date of the lunacy, as found under the Commission, over-reaching the period of the alleged retainer. No report was made under the reference to inquire, what demands were outstanding against the lunatic and his estate, and how they should be discharged. The lunatic died: but previously to his death the petition was presented, praying, that the claim may be admitted; or may be put in a course of trial.

The Attorney-General, in support of the Petition.

The Solicitor-General, admitting, that orders in lunacy might be made after the death of the lunatic upon a report, made previously, *(a)* objected, that in this instance, where the report was not made, no direction can be given after the death of the lunatic, that will have the effect of administering the assets; citing two late cases, *Garnet's* case and *Pochin's* case; and observing, that creditors are not bound in lunacy to come in, as under a decree; the only subject of inquiry in lunacy being the benefit of the lunatic, the state of his affairs, and what ought to be allowed for his maintenance.

April 22.

The Lord CHANCELLOR.—This is so far the subject of an action, as the Master, disallowing the claim, has submitted to the Court, that the petitioner must establish his claim at Law against the administrator. The question afterwards will be, whether I have authority to pay out of the assets what may be recovered in that action. My opinion is, that I have that authority. In the two late cases, *Garnet's* case and *Pochin's* case, the petition was refused on the ground, that it was presented after the death of the lunatic; after the time, therefore, when the administrator was entitled to full possession. But this petition was preferred during the life; and the universal course in that case is to apply the fund in discharge of the different creditors; unless there is reasonable doubt, whether the debt exists; which must be made the subject of consideration at Law: but when it is ascertained that the creditor has a demand, it is paid out of the funds of the lunatic. In this instance the petition was

(a) Ex parte Grimston, Amb. 706.

(1) See *Bracher's Ex.* v. *Van Cortlandt*, 2 Johns. Cha. Rep. 242.

presented during the life of the lunatic, who has died since; and the only difficulty is that which is pointed out by the Master.

1806.

Ex parte M'Douall.

Therefore let the petition be retained; that the petitioner may bring an action; and the sum, that shall be found due by the verdict, shall be paid out of the funds belonging to the lunatic.

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BRUERE *v.* PEMBERTON.

April 22, 23.

Executor not charged with interest for a balance in his hands, retained under a fair misapprehension of his right to it.

Whether interest can be claimed by petition, the decree containing no direction as to interest, *Query.*

IN this cause the usual decree had been made for carrying the trusts of the will into execution; directing the accounts, &c. The Master disallowed the claim of Sir *Stephen Lushington*, as one of the executors of the testator, for commission, on the ground, that no charge on that account had been made during the life of the testator; and an exception to the report was over-ruled; the effect of that being, that a balance of above 2000*l.* was to be accounted for by the executor, the parties, interested in the residue, which was by the will directed to be laid out in real estate, to be settled, insisted, that the executor should be charged with interest since the death of the testator, in 1793. That claim was allowed by the Master; and an exception to the report upon that point was allowed, without prejudice to the question as to interest to be paid by the executor. A petition was presented, praying, that the executor should be charged with interest upon the balance in his hands from the death of the testator, in 1793. The decree did not contain any direction as to interest. The executor by his examination stated, that he had not made interest.

Mr. Richards, and Mr. Thomson, in support of the Petition. The Solicitor-General, for the Parties intitled in Remainder.—The cases of *Longmore* v. *Broom*, (*a*) and *Raphael* v. *Boehm*, (*b*) are clear authorities for charging the executor in this manner. The former of those cases does not proceed upon any special ground. It was cited in a late case of *Wildman* v. *Jackson*, before the Privy Council, as proving the general law of the Court; that an executor, having large balances in his hands, must without any special circumstances be charged with interest; which was admitted by *The Master of the Rolls*, without the least doubt upon it. In this case Sir *Stephen Lushington* never gave the testator any reason to suppose, that he intended to charge commission. There is neither contract nor inten-

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(*a*) *Ante*, vol. vii. 124. (*b*) *Ante*, vol. xi. 92. *post.*

1806.

BRUERE v. PEMBERTON.

tion during the life of the testator to support that charge; which is deferred till after his death. Though interest does not run upon legacies to the end of a year after the testator's death, in the case of a residue the executor is bound to pay what he has received for interest from the very moment of the death. The subject of demand is a residue of personal estate from an executor, who had in his hands a sum of money admitted, and not required for any purposes of the will. The tenant for life is entitled to the interest of the whole residue. If a clear residue of personal estate can be traced into the hands of an executor, and it can be shown, that he has no use for that money except for the residuary legatee, the executor is bound to make interest of it from the very moment, at which it comes to his hands; and those, who are entitled to the interest, must not suffer by his breach of duty. The direction in *Longmore* v. *Broom* to inquire, when the balances were in the hands of the executor, shows the principle. The delay in making this demand is accounted for. The parties interested did not insist, that the funds should be brought into Court on account of the executor's claim to retain the charge for commission. Before the decision upon that claim he could not be called upon to pay the fund into Court, or to pay interest. That principal fund, which was the property of the
[388] testator at the time of his death, would have been put in a way of carrying interest, if that had not been prevented by that claim; which appears now not to have been founded in justice. Misconduct is not imputed to this executor; but he claimed that to which he had no right, and made that claim after the death of the testator, which he did not think fit to raise during his life. He is bound therefore to indemnify those, who are interested for the loss arising from his conduct. By the general rule, executors are bound, as an act of duty, to lay out the fund, so as to produce interest; and when he had this clear balance beyond what was necessary for any purposes of the will, no period for the commencement of interest can be pointed out, except the death of the testator.

It will be contended upon the examination put in by this executor that he has not made interest of this fund. Perhaps he has not. But has he not made advantage of any property in his hands? If he has placed it with his Banker, with whom it was necessary that he should keep a large balance, is not that using it? Suppose he goes further; vesting it in a mercantile concern; or lodging it in the Bank, in which he is a partner: that is not strictly making interest: but it is advantage derived: every Banker being obliged to keep by him a quantity of dead cash; and the application of the trust fund to that purpose would leave him at liberty to use his own property. But his duty re-

quired him to make interest. The case of *Raphael* v. *Boehm*, (a) which goes much further than this, turned upon the terms of the will; requiring the executor to make interest principal. In that instance the executor was charged in a way, in which it was clear he did not make interest; and, with half yearly rests; which is very unusual; upon the principle, that he was bound, and knew it, to make interest of the interest every half year. It is clear, from these authorities, that if the duty of the executor requires him to make interest, he shall be charged with it.

1806.

BUTLER v. PEMBERTON.

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Upon the objection of form, the decree directs an account of principal and interest. It is competent to the parties to apply now for what they might have had at that time; and which belongs to them as much as the principal.

Mr. Pemberton, Mr. Hollist, and Mr. Dart, for the Executors.—In *Longmore* v. *Broom* (b) the property was given to the executors, in trust to dispose of it among the objects in such shares and proportions, and at such time or times, as they in their discretion should think proper; and the executors conceived, that they had during their whole lives to make the disposition. The point also was not at all argued: the original decree directing an account of balances in the hands of the executors from year to year; upon which nothing was contended.

2dly, Such an order as it prayed, cannot be made upon petition, unless there is something in the decree to warrant it. Formerly, in order to charge interest upon an unliquidated sum, it was necessary to make it part of the bill. It has however been determined, that by decree interest may be directed, or reserved, though not claimed by the bill. But so lately as in the case of *Weymouth* v. *Boyer*, (c) interest was refused, as not being prayed by the bill. Afterward in *Creuze* v. *Louth*, (a) before the Lords Commissioners, the objection was taken, that interest could be given only upon further directions, not upon a petition; the object of which is only to execute what is ordered by the decree; and the Lords Commissioners held, that it might be by petition. But that was reversed by Lord *Rosslyn* after a full argument.

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The Lord CHANCELLOR.—I am struck with the objection as to the form; upon which it will be necessary to look into the case of *Creuze* v. *Louth*. (b) As to the circumstances of this case, I am not disposed to press upon executors. It is clear, that Sir *Stephen Lushington* would have been entitled to commission; and the claim was de-

(a) *Ante*, vol. xi. 92. *post*.
(a) p. 389. *Ante*, vol. vii. 124. (b) p. 389 *Ante*, vol. i. 416
(a) p. 390 4 *Bro. C. C.* 157. 316. *Ante*, vol. ii. 157.
(b) p. 390. 4 *Bro. C. C.* 157. 316. *Ante*, vol. ii. 157.

1806.

BAUKER v. PEMBERTON.

termined against him merely on the ground that he had not charged it in his accounts from time to time; and the Judgment of the Master upon that is perfectly right. But, until that judgment was given against this executor, he might conceive that he was in the common case, entitled to it; and, if he made no profit, under these circumstances it will deserve consideration, whether he should be charged.

April 23.

The Lord CHANCELLOR.—Of late executors have been brought to a stricter account than formerly; I find, (and I have no disposition to alter it, or to affect any rule concerning executors,) that, if executors are directed to lay out the fund, so as to render it fruitful, and they do not lay it out,
[391] but neglect their trust, they shall pay interest. But it would be too severe to hold, that an executor who has brought in his account, fairly making a claim that appears to him, and to the Court also, to be just, but of which he cannot from the evidence, furnished by his own liberality in not making the charge during the life of the testator, avail himself, and the fund, though he considered it to be his own, proves by the judgment of the Court to be not his, but the testator's, and is ordered to be paid into Court, shall be in the same situation, as if he had known it to be the testator's property; and had neglected his trust. No instance is produced, in which the Court has dealt so strongly and harshly with an executor. This petition therefore must be dismissed.

If it was necessary to determine the point of form, there is much doubt, whether this can be brought before the Court regularly by petition. Lord *Rosslyn*, reversing the order of the Lords Commissioners, held, that the office of a petition is to carry a decree into execution. But it is not necessary in this instance to determine this point; for, if this claim of interest was before me upon further directions, my judgment under these circumstances would be the same.

Petition dismissed.

1806.

COTTON v. HARVEY.

April 21.
May 7. 19.
June 3. 6.

The Master not ordered to certify whether he was satisfied with the production of papers by a party.

THIS bill, filed against a Solicitor, who was the executor of a deceased Solicitor, charged that the Defendant had made use of the papers of the testator, for the purpose of obtaining advantage in his profession, * as a Solicitor. The usual decree was made for an account of the personal estate, &c.; and an inquiry was directed, whether any, and what advantage had been made by the Defendant, according to the bill; with the usual direction, that the parties shall be examined, and produce all books, papers, &c. as the Master shall direct.

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A motion was made by the Plaintiff, that the Master should be ordered to certify, whether he was, or was not, satisfied with the production made by the Defendant; upon the ground, that it appeared by the Defendant's examination and affidavit, that certain bills of costs were in his possession, which he had not produced.

The Solicitor-General, in support of the Motion.—The object of this motion is to lay a foundation for an appeal from the judgment of the Master; who has refused to certify, whether he is or is not satisfied. The Master must make a certificate; and this is the only mode of obtaining it. In a late case of *White* v. *Lupton* the Court received an application, in some respects, though not precisely, similar. The subject of the suit was a colliery. An order was made, that the Defendant should produce before the Master all books, papers, &c. This motion was not necessary: the Master, immediately upon application to him, certifying, that he was satisfied with the production. An application was made to the Court for an order, that the Master should receive further interrogatories for the examination of the Defendant. Upon that application Lord *Eldon* differed from the judgment of the Master, that the production was satisfactory: but no order was made: the Master, upon intimation to him of the Lord *Chancellor's* judgment, receiving the further interrogatories; and the result of the further examination was, that the most material book had been withheld. In that instance the Master certified, not that there had been any default, to which it was contended his certificate must be confined, but, that he was satisfied; merely that the opinion of the Court might be taken by way of appeal from his judgment

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Mr. Wm. Agar, for the Defendant.—This motion is contrary to practice; by which the Master is confined to negative certificates. The only instance of an affirmative certificate is that of *White* v. *Lupton*; which is not an authority for the order now desired; being an application by

1806.

COTTON v. HARVEY.

way of appeal from the certificate, which the Master had granted voluntarily: this motion being for an order upon the Master to certify the one way or the other. The most convenient and reasonable course is, if there is reason to suppose, that the Defendant has not made a full disclosure, to lay a ground by affidavit; stating the papers, which he ought to produce. Some affidavit is necessary; as this is a suggestion, that the Master has not done his duty. The motion, of which notice has been given, is, that the Master shall be ordered to certify, whether the Defendant has, or has not, produced all, or any of the bills of costs, directed by the decree to be produced; particularly the following; then specifying bills in several different causes. The order desired is not merely unnecessary, but would be nugatory; and the proper mode of appealing from the Master's judgment, which is admitted to be, that the Defendant ought not to produce those particular bills of costs, is without any certificate, an application, that he shall in addition call for the production of those bills.

[394] *The Lord* CHANCELLOR.—I find, that it is not usual, when the Master is satisfied that there has been a full production, to certify his satisfaction. It does not appear, that in *White* v. *Lupton*, Lord *Eldon* would not have made the order desired, if it had been necessary; and the result of further interrogatories exhibited was, that material papers were found, notwithstanding the affirmative certificate of the Master; and they were produced without an order. There must be some mode of correcting the Master's judgment, if he has been satisfied, when he ought not to have been satisfied. There is a clear right to an inquiry, whether the Defendant had such papers, or not.

A motion was afterwards made upon the merits, that the Plaintiff may be at liberty to exhibit fresh interrogatories: *The Solicitor-General* insisting, that the Defendant had not given sufficient evidence that he had produced all the papers in his possession. By a further examination, the first being held insufficient, he stated, that he had several bills of costs, which he was ready to produce, and which would show all that he had made, &c. (following the interrogatories.) Afterwards, having brought in some papers, but many to which he had referred not being forthcoming, he made a general affidavit, that he had brought in all he could find.

The motion stood over, to give the Defendant an opportunity of making a more particular affidavit; and he afterwards admitted, that he had discovered other papers.

1806.

GREENAWAY *v.* ADAMS. (1)

ROLLS.
May 12, 13.

Covenant in a lease not to let, set, or demise, the premises, or any part for all or any part of the term, without consent, restrains assignment.

Vendor upon objection to the title, sold to another, after notice that she would do so, if the title was refused.

Under a bill for a specific performance, or an issue, or reference to ascertain the loss of the first purchaser, a reference was directed upon the authority of *Denton* v. *Stuart*. (2)

As to the principle, *Query*.

THE bill prayed the specific performance of an agreement by the Defendant to sell her interest in a public house at *Greenwich* to the Plaintiff *Greenaway*; who stated himself to be a trustee for the other Plaintiff *Drummond*; or, in case the Defendant cannot make a good title, that she may be decreed to refund the deposit, with interest, and also make satisfaction to *Drummond* for the loss or injury he has or may have sustained by the non-performance of the agreement; and that an issue may be directed to try, what loss and injury the Plaintiff has so sustained; or a reference to the Master.

The interest of the Defendant was the residue of a lease for 26 years, granted to her late husband, and bequeathed by him to her. An objection was taken to the title; on the ground, that the tenant was restrained from assigning without the license of the landlord by the following covenant in the lease:

"And also that the said *John Adams*, his executors or "administrators, shall not nor will at any time or times "hereafter, let, set, or demise, the before mentioned mes- "suage or tenement and premises or any part thereof, to "any person or persons whomsoever for all or any part of "the said term of 26 years hereby demised without the "consent in writing of the said *John White* and *Elizabeth* "*Judith*, his wife, or the survivor of them, or the heirs "and assigns of the said *John White*, for that purpose first "had and obtained."

That covenant was followed by a proviso for making void the lease upon such letting, setting, or demising. *When the objection was taken, the Defendant insisted upon her right to assign without the concurrence of the lessor; and gave notice to the Plaintiff, that, if he would not take the title, she would dispose of it to another; which she afterwards did. The Plaintiff paid 100*l. *into Court under an order.*

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The Plaintiff Drummond went into evidence of special damage by disposing of another business in which he was engaged, in consequence of having entered into the agreement with the Defendant, and for the express purpose of paying the purchase money.

Mr. Alexander, and Mr. Thomson, for the Plaintiff.—The first question is upon the construction of this covenant. The word "assign" is not contained in it: but the intention of both parties to prevent assignment is clear; not on-

(1) Cited, 1 Johns. Cha. Rep. 150.

(2) *Phillips* v. *Thompson*, 1 Johns. Cha. Rep. 132.

1806.

GREENAWAY v. ADAMS.

ly from the nature of the provision, but also from the expressions, that are used. The construction cannot be, that an under-lease only is prohibited. The expression is "for "all or any part of the term." A transfer for all the term is nothing but an assignment. No case has occurred upon such words as these: but a question has frequently arisen upon the converse of them; whether the lessee has by under-letting committed a breach of a covenant against assigning. Against that many reasons may be urged: the original lessee still continuing the tenant: the relation of landlord and tenant therefore not being changed. But, considering the converse of that case, what motive can be imagined, inducing the lessor to restrain an under-lease, and to permit an absolute assignment of the term? The words of this covenant import an assignment of the term: one of the words "set" being used in the common technical expression
[397] of conveyancers "set over." The strict technical import of the word "demise," from the verb "*dimitto*," also is any transfer or conveyance; though by habit it is generally used to denote a partial transfer by way of lease. That term is applied to estates in fee-simple and fee-tail, according to Lord *Coke*, (*a*) who uses the terms "demise" and "conveyance" as synonymous. The words used in this covenant therefore cannot be limited to an under-lease. The object of such restrictive clauses is to guard against the change of a tenant, a change in the occupation, applying with more force to a transfer of the whole.

The next question is as to the relief prayed in the alternative: either an issue, or a reference to the Master, to ascertain the damage sustained by the Plaintiff by the default of the Defendant; if she cannot perform her contract: and, if the Court has the jurisdiction, whether a case is made for that relief. The jurisdiction stands upon reason, supported by authority. The Defendant, having parted with the premises, has deprived herself of the power of performing the contract. When the bill was filed, the Plaintiff could not tell, that she would not previously to the report procure the lessor's concurrence; as she might clear the title by getting in incumbrances, &c. (*b*) The bill therefore is proper. This relief was given by Lord *Kenyon* in the case of *Denton* v. *Stuart*: (*c*) stated by *Mr. Fonblanque*, and by Lord *Redesdale*, and the present *Solicitor-General*, in *Brodie* v. *St. Paul*. (*d*) It is true, that is the only case for this jurisdiction: but it is an express and considerable authority;
[398] frequently referred to, and always with respect. (1) No other

(*a*) 2 *Inst. Westm.* 2. (*b*) See *Jenkins* v. *Hales*, *ante*, vol. vi. 616.
(*c*) In Chancery, *July* 4, 1786. 1 *Fonb. Treat. Eq.* 43, 176. 180. Vol. ii. 438. (*d*) *Ante*, vol. i. 326. See page 529.

(1) The case of *Phillips* v. *Thompson*, 1 Johns Cha. Rep. 132, is said by Chancellor *Kent* to "have been a case under similar circumstances" See the course of proceeding in that case.

instance can be found; as the case seldom occurs *in specie*. It very rarely happens, that a Defendant insisting, that he has a good title, pending the suit disables himself from performing the contract. That is out of the range of the general cases of specific performance. The distinction cannot be, as represented by *Mr. Fonblanque* in one passage, (*a*) between a reference to the Master, and an issue *quantum damnificatus*. They must proceed upon the same principle. 1806. GREENAWAY v. ADAMS.

Mr. Wetherell, and Mr. Gregg, for the Defendant.—Upon the construction of the covenant, the term "*demise*" is much too vague, as a definition of the assignment of a lease. The distinction between covenants against assigning and underletting is clearly settled. In *Chase* v. *Rugby* (*b*) the most general words were held not to restrain an under-lease; and the Court notices the distinction between a partial and a total change of the occupancy. In *Doe* v. *Carter* (*c*) also the words were very general. Since these authorities a clear difference has been marked between a covenant restraining an under-lease and a covenant against assignment of the whole interest. Provisoes in all covenants are to be construed strictly. There is no instance of an assignment, included, as within the meaning of such words as these, having the peculiar signification of lease only. The words "*set*" and "*let*" are synonymous; and the former has no connection with the expression "set over," used in conveyancing.

2dly. Under the circumstances the Plaintiff abandoned the contract: and gave the Defendant a right to sell to another. He had notice from the Defendant, that, if he would not take such title as she had, she would sell to another; as in *Pope* v. *Simpson* (*d*) [399]

3dly. If the Plaintiff has any case, it is only for damages at Law, not for a specific performance, which in consequence of his dereliction of the contract is now impracticable. There is inconsistency in claiming a specific performance after objecting to the title, and permitting a sale to another person. How can the decree be made? Can the Court under these circumstances direct the tenant to apply to the landlord? The case of *Denton* v. *Stuart* is open to objection upon principle, and is unsupported by authority.

Mr. Alexander, in Reply.—The Plaintiff, so far from abandoning the contract, paid into Court 100*l*. There is no doubt upon the meaning of underletting, for a part of the term: but what can be the difference between demising for the whole term and assigning? There is no other mode of doing justice in this case, which is not a case of liquidated damages, but of penalty for non-performance, than that, which was adopted in *Denton* v. *Stuart*: an authority, not

(*a*) 1 *Fonb. Treat. Eq.* 176. (*b*) 2 *W. Black.* 766. 3 *Wils.* 234.
(*c*) 8 *Term. Rep.* 57.
(*d*) p. 399. *Ante*, vol. v. 145. See *White* v. *Foljambe*, *ante*, vol. xi 237.

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only never over-ruled, but that has never even suffered any discountenance. There is no other case, in which such circumstances, as are found in that case and this, have occurred.

The MASTER *of the* ROLLS.—It is hardly possible, that there should be any misunderstanding with regard to the [400] nature of the objection, upon the restrictive clause, taken by the Plaintiff; which must have been known from seeing it. The Defendant distinctly admits, that the objection was shaped in that manner; that the Plaintiff said, not that the Defendant could not make a title; but, that she could not make a title without the concurrence of the lessor. The answer is, that she can without his concurrence make a title; and if he will not take it, she will dispose of it to another person. They split therefore upon the construction of the covenant; and the Defendant insists, the Plaintiff was bound to take the title; as it was offered by her. The question is, which of them was right. If the Defendant was wrong, she has no right to say the Plaintiff desired an unreasonable thing.

I have no doubt upon the construction of this covenant. This case is not like *Crusoe* v. *Bugby* (*a*) where all the words of the covenant could have distinct effect and operation, without referring at all to an under lease, and it did not necessarily follow, that the lessor, as he did not choose, that the tenant should assign, therefore intended to restrain underletting. But upon the other hand it would be very strange, if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest. Clearly, both according to the letter and the spirit, this covenant did restrain assignment without license. The Plaintiff is therefore right in his construction of the covenant; and the Defendant was wrong in saying, she would not even attempt to perfect her title. If she had attempted it, and the landlord had refused his consent, that might have created a different question: but as it stood, [401] when the bill was filed, the Plaintiff was right; insisting, that the Defendant should do what she could to give him a good title. Afterwards she rendered herself incapable of performing the contract. It is impossible therefore to decree a specific performance of what she is unable to do.

It is insisted, on one side, that in that state of circumstances, all that the Court can do, is to dismiss the bill, and leave the Plaintiff to Law: on the other side, that, though the Court cannot give the specific relief, originally prayed, it may give some relief; and, if so, this is a case, in which relief ought to be given. That is contended upon the au-

(*a*) 2 *W. Black.* 765. 3 *Wils.* 234.

thority of *Denton* v. *Stuart*, (a) That case is so shortly stated in any account of it, that I have seen, that it is impossible to collect distinctly the principle, upon which it was decided. (1) It may be very probably from that defect, that I have ever entertained any doubt upon the principle of that case. The party, injured by the non-performance of a contract, has the choice to resort either to a Court of Law for damages, or to a Court of Equity for a specific performance. If the Court does not think fit to decree a specific performance, or finds, that the contract cannot be specifically performed, either way I should have thought there was equally an end of its jurisdiction, for in the one case the Court does not see reason to exercise the jurisdiction: in the other the Court finds no room for the exercise of it. It seems, that the consequence ought to be, that the party must seek his remedy at Law. However the case of *Denton* v. *Stuart* is a decision in point against that proposition; and the *species facti* is precisely the same as in this case; for in that the inability of the party to perform the contract grew out of an act done by the party, after the contract had been entered into. In that case, how far Lord *Kenyon* meant the principle to extend, I do not know: but it is clear, he thought this Court ought to give damages; and in my opinion there is no difference in principle, whether the damages are to be assessed by an issue or a reference to the Master; for the question is upon the principle; whether the Court can give the party relief in that way.

1806.

GREENAWAY v. ADAMS

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Notwithstanding these doubts, in a case precisely the same as that, I shall yield my doubts to the authority of Lord *Kenyon*, and will follow the course his Lordship took. Probably, if I had the benefit of seeing the statement and developement of the principle, upon which he acted, I should be perfectly reconciled to it. I give credit to the decision, though so shortly stated, as having proceeded upon a proper principle. Upon the whole, I think myself bound to follow the authority of that case; as having never been over-ruled by any subsequent decision. I shall therefore make precisely the same decree. I think the Master just as competent to decide this as a jury. It must consist purely of pecuniary compensation.

(a) In Chancery, *July* 4, 1786. 1 *Fon. Tr. Eq.* 43. 176. Vol. ii 438. Cited, *ante*, vol. i. 329.

(1) Reported 1 Cox's Cases in Equity 238.

1806.

ROLLS.

May 20.

BATE *v.* SCALES.

Trustees under a misrepresentation, that the fund was invested in stock, charged with interest at 5 *per cent.* upon the same principle as if they had sold out stock, and used the money *viz.* an option to the *cestuy que trust* to have the actual profit, or 5 *per cent.* (1)

IN this suit, instituted by parties, claiming under a marriage settlement, against the surviving trustee, who was also the executor of the other trustee, deceased, * the Plaintiffs sought to charge the Defendant with interest at 5 *per cent.* upon the admission of a representation by the trustees, that they had stock to the amount of 300*l.* standing in their names in 1777; accounting for the dividends; and settling an account, as for stock, in 1784, though there was no such fund: the Defendant representing, that, with the concurrence of *Bate* and his wife, *Horne*, the deceased trustee, kept the money, and was to account for it as stock.

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Mr. Richards, and Mr. Hare, for the Plaintiffs.—The representation now made by the Defendant, is that in 1777 he and the other trustee had not the stock; but that he is willing now to give the fund, as stock at that time; having used the money, and dealt in the funds from that time to this. That is not the proper course of dealing between trustee and *cestuy que trust*. It is clear, the trustees had in their hands property, that was worth and would have purchased 300*l.* stock; and the defendant is charged, not upon speculation, but upon his admission, that they had the fund, that they never made an appropriation; and that they have been dealing with it, as they thought fit. Therefore, if charged with that fund, and 5 *per cent* upon it, they are not charged with more than is usual in such cases, upon the principle, that a trustee having the fund in his hands, and using it as his own, the *cestuy que trust* shall have the greatest advantage that could have been made of it; having an option to take what has been actually made: or, if that does not give 5*l. per cent.* which at least must be supposed to have been made. A trustee, representing himself to have this fund in 1777, must be considered in the same situation as if he had sold or converted the stock; in which

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case the settled rule, giving an option either to have the stock replaced, or to take the money with 5*l. per cent*, would prevail. The authorities, establishing that are *Harrison* v. *Harrison*, (*a*) *Bostock* v. *Blakeney*, (*b*) and the late case, *Pocock* v. *Reddington*. (*c*) These Plaintiffs are therefore entitled to have the capital replaced, and the difference between the dividends, for which they offer to account, and 5*l. per cent.* from 1777.

Mr. Alexander, and Mr. Thomson, for the Defendant.—The principle of the cases referred to is admitted; but it is

(*a*) *Ante*, vol. i. 121. (*b*) 2 *Bro. C. C.* 653.

(*c*) *Ante*, vol. v. 794, the references in the note (*a*), 797. *Rocke* v. *Hart*, *Mosley* v. *Ward*, *ante*, vol. xi. 58. 381.

(1) See *Hart* v. *Ten Eyck*, 2 Johns. Cha. Rep. 117.

not applicable. The answer to this charge is, that *Bate* and his wife knew that the trustees had this money; and wished *Horne*, who was a man of fortune, to keep it upon his personal security. They could not be imposed upon by the account. The understanding was, that, though the account was taken, as if the fund existed in the shape of stock, it was no more than that *Horne* was bound by his personal liability for so much stock. If the fund never was invested, and that was occasioned by the *cestuy que trust*, what ground is there for taking it as at a particular day? This does not resemble the case where a specific fund can be followed. 1806. BATE v. SCALES

Mr. Richards, in Reply, insisted, that to support the claim against the trustees, it was sufficient to establish, that they had represented, that there was stock, and that the concurrence of the Plaintiffs was not made out.

The MASTER *of the* ROLLS.—If the sum had been originally invested in stock, there must have been some time, at which it ceased to be stock; and then the admitted principle would apply. It is just the same, whether he had it actually, or by his representation is to be taken as bound. See the consequence; supposing that representation could be made without any interference against the trustee, except that, when the falsehood of the representation is discovered, he should invest the fund in stock. The trustee might always take his chance of being able to purchase stock upon a subsequent day at a less price. He shall not have that chance. I will take him to have had it, and to have sold it. When a trustee sells out stock, there is a chance that the stock may rise: so that a loss may be incurred by him upon reinvesting the money. That however is not considered: but he is held to account upon the principle, that he might have had a profit. [405]

If this was a representation of a falsehood, to which *Mr. Bate* was privy, then at least to the extent of his interest he could not set up a claim, and it is doubtful, whether any one could, for then the trustee would not have deceived any person. It would be a mere contract, that they would take his security instead of funded security; and all they could desire would be, that he should give them funds, whenever they chose to ask for them. The parents were contracting for their children; and the children could not have insisted upon his doing more than he originally undertook to the party contracting. There is no evidence, that *Mr. Bate* was privy to the fact, that there was no stock. The evidence is rather the other way. It is not proved, that there was no stock. On the contrary, from the evidence, it appears probable that there was some. I consider the case of a representation, that the stock did exist [406]

1806.

BATE v. SCALES.

as precisely a parallel case to the actual existence of the fund in stock upon that day; which stock was sold out.

Upon the whole, the Plaintiffs are entitled to what they pray.

May 12, 13 19.

MILL *v.* MILL.

Examination to the credit of witness can only be by order upon special application with notice, whether before or after publication.

Therefore evidence taken to that point upon the examination in chief suppressed, as impertinent. (1)

THE bill, filed by the heir at law, and next of kin, against a person claiming as devisee under several testamentary instruments, and as creditor by an Annuity secured by the bond of the testator, charged, that at the time these instruments were executed, the testator was incapable of doing any valid act; and that they were obtained by undue influence; and prayed an account of the personal estate; and, that the validity of the testamentary instruments and the bond may be proved. The answer denied the charges of the bill; and insisted upon the sanity of the testator. The parties went into evidence, and the Defendant examined his witnesses in chief to the character and credit of the Plaintiff's witnesses.

A motion was made by the Plaintiff for a reference to the Master to look into the interrogatories, exhibited by the Defendant before the commissioners and examiner for the examination of the Defendant's witnesses in this cause, and into the depositions thereupon taken, and to certify, whether the said interrogatories and depositions, and which, if any of them are leading, scandalous, or impertinent; or seek to impeach the credibility of the Plaintiff's witnesses.

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Mr. Cullen, in support of the Motion.—The course taken by this Defendant, examining his own witnesses in chief to the character and credit of the Plaintiff's witnesses, is contrary to a standing order of the Court, (*a*) the established practice, and to reason. The character and credit of the witnesses are not in issue. The answer merely denying the charges of influence, and insisting, that the testator was of sound mind, &c. no particular circumstances stated, nothing but the sanity of the testator was in issue, and the due execution of the will. The only way in which an examination can be had to character and credit is by leave of the Court, upon a special application and notice: otherwise it

(*a*) Orders in Chancery, 105. *Hyatt's P. R.* 194. *Bond. Ch. P.* 374.

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(1) See *Troup* v. *Sherwood & Wood*, 3 John. Chs. Rep. 558.

is impertinent; the terms of the standing order show, that it applies to the period before publication. The Plaintiff is therefore entitled to the reference of this examination, considered as a species of impertinence. 1806. MILL v. MILL

Mr. Perceval, Mr. Richards, and Mr. Lewis, for the Defendant, resisted the application; insisting, that the authorities referred to apply only to cases after publication passed, and citing *Purcell* v. *M'Namara* (*b*) and *Carlos* v. *Brook*. (*c*)

The Lord CHANCELLOR.—The object of this motion is to suppress interrogatories and the depositions, taken under them, as leading, scandalous, and impertinent, and under the latter description are represented those, which go to the examination of the credit of the Plaintiff's witnesses. The point is of great importance, whether upon the examination in chief, where a Plaintiff attempts to prove his case by persons of infamous character, the answer to it consisting perhaps entirely of an attack upon the character of the witnesses, the Defendant cannot meet the Plaintiff's case by showing, that his witnesses are not worthy of credit. The only question is, in what manner that can be done: whether in the original examination: or whether before publication the examination must be confined to the merits; and the examination as to credit is to be left to a special application to the Court afterwards. The expression in the order, (*a*) that this is to be sparingly granted, is not very intelligible; for if credit can be impeached upon the original examination before publication, the other party must of course be allowed to support it. At Law, the Plaintiff having proved his case, the Defendant may call witnesses to show, that the Plaintiff's witnesses are from their character not to be believed: and goes into no other case. The only question here is how, and what particular stage and period of the cause this is to be done; and convenience may have given rise to one rule or another. It appears to me better, that this should be done upon special application: stating, that such witnesses have been examined; that the party can invade their testimony; and praying liberty to do so. Then the other comes prepared; and the Court will judge whether it is necessary, or not. But I will take the means of having this point settled with precision. [408]

Examination to credit of a witness at Law.

**The Lord* CHANCELLOR.—I have looked into the books of practice upon this point: and consulted the examiners; [*]

(*b*) *Ante*, vol. viii. 324.
(*c*) *Ante*, vol. x. 49. *Wood* v. *Hewerton*, *ante*, vol. ix. 145.
(*a*) Ord. Ch. 107

1806.

MILL v. MILL.

and I find the practice perfectly settled, that this examination to credit cannot be had without a special order upon application to the Court, and notice to the party. I have also mentioned it to Lord *Eldon*; whose opinion is clear, that such is the course. I was very glad to find the practice settled with great precision; and should have felt much regret in finding it afloat upon such a point.

The reference was directed accordingly

ROLLS *May* 9.

BARKER v. BARKER

Devise, in default of issue male of A to the first daughter living at the death of the testator, who should attain 25, for life, with remainder to her first and other sons in tail-male remainders over, subject to a trust for debts and accumulation of the surplus rents and profits, until a son or daughter should first come to the actual possession of the estates or receipt of the rents, after that period such person to take the surplus rents; and the surplus of the accumulation, after payment of the debts to be paid to such person or persons, who by the limitation should first come to the actual possession of the estates, or receipt of the rents and profits.

A daughter living at the death of the testator, and having attained 25, entitled to possession of the estate and to the accumulated fund.

JOHN BARKER by his will, dated the 24th of *January* 1792, devised all his freehold estates to his brother *George Barker* and his heirs, to hold to the use of *Robert Wilson* and *Charles Dunnan*, their executors, for the term of 1000 years, and, subject thereto, to the use of *Martha Mason* and his heirs upon trust, to convey to *Sarah Barker* should she have no issue male by *Mary Lee*, his wife, living at the testator's death that *Mason* and his heirs should stand seised subject to the term, in trust for such daughter of *Sarah Barker*, as should be living at the testator's death, first attaining her age of twenty-five years, during her life, without impeachment of waste, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of such daughter in tail-male, with cross remainders to the other daughters in tail-male; remainder to the right heirs of the testator.

The trust of the term was declared among other things out of the rents and profits of the said estates, or by demise, mortgage, or sale, of the said term, or by all or any of the ways and means aforesaid, or by any other lawful or reasonable ways and means, to pay certain Annuities and portions; and upon further trust in case the testator's personal estate, after bequeathed to be applied in discharge of his just debts and funeral expenses, should fall short, not be sufficient to pay off the same, by the ways and means before mentioned, to levy and raise such sum or sums of money as his personal estate should fall short of, and not be sufficient to pay off his just debts and funeral expenses;

and to pay and apply the money so raised in aid of his personal estate, towards satisfaction and discharge of his said debts and funeral expenses; and he directed, that no sale or mortgage should be made of all or any part of the said premises, until some or one of the several sums directed to be raised under the trusts of the said term should be payable; and that after the performance of the several trusts declared concerning the term, the trustees should permit *Mason* and his heirs to accumulate and improve the surplus rents and profits, until the eldest, or only, or some one of such sons or daughters of his brother should first come to the actual possession of his said estates, or the receipt of the rents; and after that period to permit such person who should from time to time, during the performance of the trusts of the said term of 1000 years, be entitled to possession, &c. to take the residue and surplus of the annual profits of the said term of 1000 years, for his own use and benefit, and that in case the rents, issues, and profits of his said estates, which should have accumulated for payment of all his just debts, funeral and testamentary expences, his will was, that *Trustees* should pay the same to the person or persons, who the limitation thereof would first come to the actual possession of the estates, or the receipt of the rents and profits thereof; and he authorized the trustees to cut and sell timber; and the money arising therefrom to be ordered to be applied in discharging the debts.

1806.

BARKER v. BARKER

[411]

After the usual decree and report of the Master, stating, that the personal estate was insufficient for the debts, ascertaining the different incumbrances proper to be raised, the necessary sum by mortgage of the premises comprised in the term, an order was made for that purpose, and that the money raised should be paid into the Bank, and applied in payment of the debts, and a receiver having been appointed, the rents and profits accumulated to the amount of 600*l.* by Bank annuities were Consolidated Annuities.

A petition was presented by the eldest daughter of *James Barker*, who was living at the testator's death; and had attained the age of 21, (there being no issue-male;) praying, that she may be let into possession, and receipt of the rents, &c. and that the fund, created by the accumulation of the rents and profits, may be paid to her.

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Mr. Richards, and Mr. Grenhill, in support of the Petition.

Mr. Leblanc, for the Daughters, entitled in remainder, opposed it.

The MASTER *of the* ROLLS, made the order according to the prayer of the petition.

1806.

May 7.

WOOD *v.* LEAKE.

Arbitrator has a power, subject to his discretion, to proceed *ex parte*, if one of the parties will not attend.

IN this cause the parties had gone to an Arbitration. *The Attorney-General, and Mr. Leach, for the Defendant*, moved, that the Arbitrator should be ordered to proceed *ex parte*.

The Lord CHANCELLOR refused to make the order; observing, that every Arbitrator has the power to proceed *ex parte*; if one of the parties, though duly summoned, will not attend, with a view to prevent justice, and defeat the object of the reference. The Arbitrator is to judge of the discretion of it.

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ROLLS.

May 16.

GIBBS *v.* OUGIER.

Real estate, to be converted into personal for special purposes, not personal property to all intents: so as to let in creditors by simple contract.

Assets marshalled, if it appears at any period of the cause, that specialty creditors have gone upon the personal estate; though the bill is not framed with that view.

PETER OUGIER began his will, duly attested, to pass land according to the Statute of Frauds, (*a*) in the following manner:

"In the first place I direct my body to be decently interred at the discretion of my executors in trust herein after named: willing and hereby intending to make a complete disposition of the real estate, whereof I am seized, and of my personal and chattel real estates I dispose thereof to the person and persons, and in manner herein after mentioned."

The testator then, giving to his wife all his household goods and furniture, plate, &c. and 500*l.*, to be paid to her within one month after his decease, gave his messuage or tenement, called *Catterbury* and other lands, within the parish of *Blackawton*, and all other his lands, &c. in the parish of *Clifton*, *Dartmouth*, *Hardness*, or elsewhere, and all the rest, residue, and remainder of his personal estate, to his wife and *Richard Newman*, and to their heirs, executors, and administrators, upon trust, to sell the whole, and every part thereof, as soon after his decease as conveniently might be; and by, with, and out of, the money arising therefrom, in the first place he directed, that his trustees should raise 6000*l.* After declaring a trust of that fund, for the benefit of his wife and children, and making a further provision of 2000*l.* for each of his three children, he desired, that his said trustees "shall place out all the-

(*a*) Stat. 29 *Ca.* 2. *c.* 3

1806.

GIBBS v. OUGIER.

[* 414]

"overplus moneys, that shall remain after raising and "placing out the aforesaid three several * sums of 2000*l.* "and of 6000*l.*," upon security; and improve the interest, until his son *Peter Ougier* should attain the age of 24; and then he gave and bequeathed the same to him; and, in case his said son should die under the age of 24, then he gave and bequeathed such overplus monies, and the interest to arise therefrom, to his two daughters at such time as their several bequests of 2000*l.* would become payable, share and share alike. He then gave to his mother an Annuity of 60*l.*, to be issuing out of, and charged and chargeable, and he did thereby charge the same, on his lands in the parish of *Blackawton*; and appointed his wife and *Newman* executors in trust of that his will, with a direction that neither of them should be charged or chargeable with, or account or be accountable for, any more or other part of his "hereby trusted estate," than should actually come to their respective hands; and a declaration, that, if his wife should claim dower, she should not be entitled to any of the bequest given to her, except the legacy of 300*l.*, and the household goods, &c.

The bill, filed by a creditor by simple contract, on behalf of himself and all the other creditors of the testator, prayed the usual decree, and, that, in case the personal estates shall not be sufficient to satisfy the debts, the real estate may be declared liable to make good the deficiency.

Mr. Thomson, and Mr. Wetherell, for the Plaintiff:—The real estate is subject to the debts: the effect of the directions in the will being to convert the real estate, and every part of it, out and out into money. The peculiarity of this case is, that there is no provision made for the debts; as there is in *Kinsey v. Coussmaker*, (*a*) and all the other cases: either by a direction to sell for payment of debts, or by a charge of debts, neither of which, it is true, is in this will; and this fund consequently cannot be represented as strictly either equitable or legal assets. But the intention appears, that to all intents and purposes the real estate shall be converted into money; by the effect of which direction it is mere personal estate, and must be taken as such by the executor or next of kin, and by analogy the Court will say, it cannot be got at without paying the debts. The passage at the commencement of the will clearly marks the intention: "willing and hereby intending to make a complete "disposition of the real estate, whereof I am seised," &c. followed by a direction to sell all the real estate. The intention was, that no part should remain land; but there should be a complete conversion.

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Mr. Richards, for the Defendants, was stopped by the Court.

(*a*) *Ante*, 136. Vol. 1 436 Vol. ii 267

1806.

GIBBS v. OGILER.

The MASTER *of the* ROLLS.—If you can find a substantive and independent intention to turn the real estate at all events into personal, that will do: not, where there is only a specific purpose; and no conversion, except to answer that purpose; as, if the direction is to convert the estate in order to give a legacy, the creditors cannot come and take that from the legatee, merely as that is the mode in which it is given to him. The expression, "overplus moneys," must be construed, "moneys previously set apart."

Resulting trust for the heir a special disposition of money, to be raised by the sale of real estate, failing by lapse.

* Suppose a lapse had occurred: would not the heir have taken? (*a*) The case of *Kidney* v. *Coussmaker* was very doubtful; and the decision was much against the opinions, that were taken upon it. The creditors got at the estate by applying the words "after payment of my debts" to the whole fund, considering it as a residue. That case is a strong authority; for if this will do, all the subtle argument, used upon that occasion to make the real estate a [* 416] fund for the debts, would have been unnecessary.

The common decree was pronounced for an account of the personal estate, &c.

For the Plaintiff it was then said, the creditors had a right to marshal.

Mr. Richards, for the Defendants, objected, that the bill was not framed with that view: to which it was replied, that if the Court sees at any period, that creditors by simple contract will be deprived of their debts by specialty creditors going against their fund, the Court will, of itself, without being called upon, direct the assets to be marshalled.

The MASTER *of the* ROLLS.—I think so. Suppose it appeared for the first time by the report, that a specialty creditor was paid out of the personal estate: it would not be necessary to file another bill for the purpose of marshal- [417] ling the assets. The simple contract creditor, when filing the bill might not know, that specialty creditors were paid out of the personal estate. My opinion is, that this direction may be made, unless the practice is quite the other way. I am disposed to make the decree at present: but it may be mentioned again upon this point, if any thing is found upon it.

The decree was made; and it was not mentioned again.

(*a*) *Berry* v. *Usher*, *Brown* v. *Major* [illegible] *Williams* v. *Coade*, *ante* vol. x. [illegible] and the references

1806.

ROLLS.
May 22.

THOMAS *v.* DAVIES.

To get money out of Court, however small the amount, a prerogative probate is necessary.

A PETITION by an executrix prayed an order, that the sum of 37*l.* 10*s.* should be paid to her out of Court: the Accountant General objecting to pay it upon a probate in the Consistorial Court of the diocese, in which the executrix lived.

Mr. Martin, in support of the Petition, said, such orders had been made by Lord *Alvanley*; where the sum was under 50*l.*

The MASTER *of the* ROLLS refused to make the order upon that part of the petition; referring to the cases (*a*) decided by Lord *Eldon*, that for an order to get money out of Court, however small the amount, a prerogative probate is necessary.

(*a*) *Newman v. Halyer*, *ante*, vol. vi. 409.

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June 18.

Ex parte COOPER.

When the fourth day after a docket struck is a Holiday, the practice of the Bankrupt Office is to permit a docket to be struck upon the first application the next day; as, though the Office was shut the party might apply at the Clerk's residence.

THE prayer of this petition was, that a Commission of Bankruptcy may be superseded under the following circumstances.

A docket had been struck against the Bankrupt on *Thursday* the 14th of *May*. The last of the four days allowed for proceeding was *Sunday*, and the next day, being *Easter Monday*, was a Holiday, and the Bankrupt office was shut. On *Tuesday* the Solicitor's Clerk went to the office at 11 o'clock in the morning; and found, that another docket had been struck by another creditor; upon which the Commission issued.

Mr. Wetherell, in support of the Petition, urged, that on *Monday* the creditor was not bound to find out the Clerk of the Secretary of Bankrupts at his residence; and therefore was in proper time at the office on *Tuesday*.

Mr. Cullen resisted the Petition; insisting, that the usual course, well known in the profession, is, when the office is shut, to apply at the Clerk's Chambers, where the Commission might have been obtained. This was confirmed by the Secretary's Clerk; who also stated the practice of the office to be, if the fourth day is a Holiday, to permit a docket to be struck upon the first application the following day.

The Lord CHANCELLOR dismissed the petition.

1806.

June 17.

GREEN v. STEPHENS.

Devise by very general and extensive words restrained upon the apparent intention.

Devise to the first and other sons in tail-male, and, for want of such issue, to the daughter and daughters, her, and their heirs, as tenants in common; and, for want of such issue, to three nieces and their several and respective heir for ever, as tenants in common; and for want of such issue, to the testator's right heirs.

As to the estate of the nieces, the prior limitations having failed, and the implication of cross remainders, *Query*

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GEORGE PHILIPS by his will, not executed to pass real estate, according to the Statute of Frauds, (*a*) gave, devised, and bequeathed, to *John Stoodley* and *William Stephens*, and their heirs for ever, lands and Annuities, of which he was seised to him and his heirs, to hold to them and their heirs, to the uses following: *viz.* to the use and behoof of his nephew *John Stephens* and his assigns, for the term of 99 years, if he should happen so long to live; with liberty for him to make a jointure on any woman he should marry, for the like term of 99 years, determinable at her death; and from and after their respective deaths then to the use and behoof of the first son of the body of the said *John Stephens*, lawfully begotten, and the heirs-male of his body lawfully issuing, and, in default of such issue, then to the use and behoof of the second, third, and all and every other son and sons of the body of *John Stephens*, lawfully begotten, and the heirs-male of his and their body or bodies, lawfully issuing; the elder of such sons, and the heirs-male of his body, to be always preferred, and to take place before the younger, and the heirs-male of his and their body and bodies, and, for want of such issue, then to the use and behoof of all and every the daughter and daughters of the said *John Stephens*, lawfully to be begotten, and to her and their heirs for ever, as tenants in common; and for want of such issue, then to the use and behoof of the testator's nieces, *Anne*, *Sibella*, and *Jane Stephens*, and their several and respective heirs for ever, as tenants in common; and, for want of such issue, then to the * use of the testator's right heirs for ever, and all other his messuages, tenements, or dwelling houses, with the appurtenances whereof he was seised in fee-simple in the City of *Exeter*, he gave, devised, and bequeathed, unto the said *John Stoodley* and *William Stephens*, their heirs and assigns for ever; in trust that they should, as soon as conveniently they could after his death, sell and dispose thereof, and lay out the money in the purchase of lands of inheritance, as after directed; and all the rest, residue, and remainder of his goods and chattels, of what nature, kind, or quality, soever, as well real as personal, his debts, legacies, and funeral expenses, being first paid and discharged, he gave, devised, and bequeathed, to *Stoodley* and *Stephens*, in trust, that they, their executors and administrators, should sell and dispose thereof, and call in all his debts, and the moneys arising thereout, and by sale of his lands, before directed to be sold, to lay out in

(*a*) Stat. 29 Ch. 2, c. 3.

the purchase of lands of inheritance in fee-simple; and, when purchased, he directed that the same should be conveyed and settled to the several uses, intents, and purposes, as he had before settled his Annuities and lands. The trustees were appointed executors. 1806. GREEN v. STEPHENS.

The testator died; leaving *John Stephens* his heir at law. The testator's nieces, *Anne* and *Jane*, (the sisters of *John Stephens*,) died many years ago, unmarried; leaving their sister *Sibella Green* surviving them, and *John Stephens*, their brother and heir at law. The bill, filed by *John Green*, the only son of *Sibella*, stated that, an account having been stated by *John Stephens* of the testator's personal estate, it appeared, that the balance of the clear residue amounted to 9453*l.* 2*s.* 10*d.* remaining in the hands of *John Stephens*, upon the trusts of the will of the testator; and, after the Plaintiff had attained the age of 21, he and *John Stephens* on the 22d of *September* 1781, signed an agreement, stating that fact, and declaring the trust, to be used and applied to and for the trusts and purposes, and in manner, as mentioned in *George Philips's* will of and concerning his residuary personal estate. [421]

John Stephens died without issue, and unmarried; having by his will, dated the 15th of *July* 1795, directed and appointed, that the sum of 9453*l.* 2*s.* 10*d.* being the amount of the net balance of the personal estate of *George Philips*, which came to his hands, should be raised, paid, and invested, as soon as conveniently could be after his death, pursuant to the trusts of the will of *George Philips*, and the indenture of *September* 1781; and he thereby gave, devised, and bequeathed, all his messuages, lands, tenements, hereditaments, goods, chattels, moneys, and securities for money, mortgages in fee, or for any freehold or chattel interest, and the lands and hereditaments thereby respectively mortgaged, and all other his real and personal estate of what nature or kind soever, subject to the payment of his funeral expenses, debts, and legacies, and particularly of the sum of 9453*l.* 2*s.* 10*d.* with the payment of all which he thereby expressly charged all his said real and personal estate, unto and to the use of his three natural daughters, and their heirs, executors, administrators, and assigns, for all his estate and interest therein respectively, equally to be divided between them, as tenants in common, and not as joint-tenants; and he appointed them executrixes.

John Stephens died, leaving the Plaintiff, his nephew, and heir at law.

The bill prayed, that the Defendants, the natural daughters of *John Stephens*, may either admit assets of *John Stephens*, sufficient to answer the said sum of 9453*l.* 2*s* 10*d.* or account, &c.; and, that it may be declared, that the Plaintiff is entitled under the wills of *George Philips* and *John Ste-*

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phens to have the said sum of 9453*l.* 2*s.* 10*d.* laid out in land, and settled to such of the uses of *George Philips*'s will as yet remain capable of taking effect; and that the Defendants may be decreed to pay the said sum out of the personal estate of *John Stephens*; and that the deficiency may be raised out of his real estate.

The Defendants, by their answer submitted, that under the true construction of the wills of *George Philips* and *John Stephens*, and in the events that have happened, the Defendants are entitled to two-third parts of the sum of 9453*l.* 2*s.* 10*d.* with interest, or of the lands to be purchased.

The Solicitor-General, and Mr. Hart, for the Plaintiff.—Upon the second will the construction is clear; that the testator did not mean to dispose of this property to his three natural daughters; who were the general devisees and legatees of his real and personal estates. Here are neither express words, or necessary implication, to disinherit the heir. It is clear, the testator intended this property to be real estate: express directions being given to invest it, pursuant to the will of *Philips*; by which it was to be laid out in land, to be settled. This then being real estate, this testator devises all his property, of every description, to his natural daughters, upon conditions, one of which is, to satisfy all his obligations; and among them this one, to lay out [423] this fund in land. It is impossible then to say, he intended to give this fund, subject to the payment of itself. The proposition involves gross absurdity. The intention was, that his daughters should take all his general property, after satisfying his obligations, the effect of which he intended to be to give this property to his heir, which is clearly excepted out of the general property, specifically devised; and is anxiously kept distinct from that. The right of the heir does not require the intention, but must prevail; unless the daughters can show an intention in their favour. After the disposition of this fund the devise to the daughters is absolute, without any limitation. The construction is plain, that they are to have all beyond this sum; to which this Plaintiff is entitled, not only by the law, but by the intention also, and this construction avoids the absurdity of raising this money without any object.

Mr. Richards, Mr. Fonblanque, and Mr. Hall, for the Defendants.—This will has words, by fair construction, sufficient to pass all the testator's real and personal estate; and according to *Gaidot* v. *Gaidot* (*a*) this interest will pass; though the estate was not actually purchased. All that was intended is, that the estate should go to *Green* according to the title he had. His object was merely to provide for the

(*a*) 3 *Atk.* 254.

debt he acknowledged to be due; which was to be invested in estates, to the uses of that will, under which he took an interest; subject to be broken in upon by the event of his having children, and to the question, still undecided, as to the implication of cross-remainders. There is no inconsistency in the propositions, that he meant to execute his trust; but, when executed, if he took any interest in the estate purchased, that interest, as part of his estate, should go to his residuary devisees. It was his estate; and he has disposed of all his estate. That express disposition cannot be controlled by the inference, arising from the charge; which was proper as to one-third, and he might not have adverted to the circumstance, that he was owner of the other two-thirds.

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The Lord CHANCELLOR. - I have so strong an opinion upon this case, that this will does not carry to these natural children this sum of money, that I shall not delay the judgment. It is always to be remembered that the Plaintiff is the heir. I agree, that the words of this will are sufficiently large to convey every thing real and personal, and therefore this interest would pass; unless the intention to exclude it appears sufficiently upon the face of the will. but if that intention appears upon all the circumstances, it is not necessary that the exclusion should appear by positive words. It has been urged with force for the Defendants, that this testator meant no more than to do an act of justice, as trustee under the former will, acknowledging the balance due from him, as executor; and, not only that, but that he was ready to execute the trusts of that will by investing the money in real estates, and settling them. Why was it necessary to say so in this will: an agreement having taken place *for that purpose* between him and *Green?* There is in that agreement not only an acknowledgment of the balance, but words follow, almost the same as in the will; and this is not a light memorandum, but an instrument under hand and seal. It is supposed the testator might consider, that there might be issue, who might have the estate, and it was only to make it more clear. Besides, that it was not necessary, it is impossible to suppose, that the testator contemplated that. First, the effect of such an event would have been a revocation of the will: 2dly, whatever regard he might have for these illegitimate children, he cannot be supposed, contemplating marriage, to mean that all his legitimate children should starve. The clear construction is, that he intended to give these children all he had, with the exception of this sum. I agree, he gives all his messuages lands, &c. goods, chattels, &c. and all other his real and personal estate, in the largest terms, subject to the payment of his debts and legacies, and particularly of this sum; with

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the payment of all which he expressly charged all his said real and personal estate. There was no sense in all that curiosity of expression, charging, as an incumbrance upon the daughters, that, which was to come to them: but it was very natural, if the object was a trust for other persons. Upon the whole my opinion is, that this money does not pass by the will of *Stephens* to his daughters.

Upon the question, whether cross-remainders were to be implied between the nieces under the will of *Philips*, a case was directed. *Comber* v. *Hill* (a) was referred to.

(a) 2 Str. 696. See Mr Butler's Note, Co. Litt. 185 b note 1. Mr Saunders's note to *Davenport* v. *Davis*, 1 Salk. 380 and 2 Wooddes. 210. Serjeant *Williams*'s Note, 1 *Saund.* 185, note 5. *Doe* v. *Burville*, Easter, 13 Geo. 3. *Wright* v. *Lord Cadogan*, *Perry* v. *White*, *Philpard* v. *Maxfield*, *Cowp.* 31. 777. 797. *Mackell* v. *Winter*, *ante*, vol. iii. 236. 830. *Doe* v. *Cooper*, *Doe* v. *Worsley*, 1 *East*, 229. 416.

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ROLLS.
June 17. 19. 23.

CHURCH v. MUNDY

Admittance of the particular tenant of a Copyhold is an admittance of the remainder-man.

A devise of the remainder or reversion therefore requires a surrender to the use of the will.

Admittance to a Copyhold enures according to the title; though not correctly expressed.

Copyholds not intended to be comprehended under general terms "real and personal estate;" so as to entitle her to have the surrender supplied.

HUGH MUNDY by his will, duly executed to pass real estates, according to the Statute of Frauds, (a) having surrendered his copyhold estates to the use of his will, gave and bequeathed to his son *Hugh*, his heirs and assigns for ever, several freehold premises at *Great Ilford*. But in case of the death of his said son *Hugh* without issue then he gave and bequeathed the said messuage and premises to his son *Charles Mundy*, his heirs and assigns for ever; and as to all the rest of his freehold, copyhold, and leasehold, messuages, tenements, and premises, and his dwelling-house, &c. in the Parish of *Barking*, he gave, devised, and bequeathed, the same and every part thereof unto his son *Charles*, his heirs and assigns for ever; but in case of the death of his said son *Charles Mundy* without issue then he gave and bequeathed the same unto his said son *Hugh Mundy*, his heirs and assigns for ever.

Hugh Mundy, the younger, by his will, not executed to pass real estates, according to the Statute of Frauds, (b) made the following disposition:

"And as to all such worldly estate and effects as it may "please God to bless me withal, or I may leave, or I may

(a) Stat. 29. Ch. 2. c. 3. (b) Stat. 29 Ch. 2. c. 3.

"be entitled to at the time of my decease, whether real or "personal, not herein before given or disposed of, I give, "devise, and bequeath, the same" to *Golding*, to hold to him, his heirs, executors, administrators, and assigns, for and during such terms *and estates as the testator might by his will create; in trust, his wife *Mary* to receive and take the rents, issues, dividends, and profits thereof to her own use, for and during the term of her natural life, whether she should be covert or otherwise, and in case she should die, leaving no issue, then upon trust from and immediately after the decease of his wife, for his trustee, his heirs, executors, and administrators, to release, assign, and convey, his said real and personal estate to his brother *Charles Mundy*; to hold to him, his heirs, executors, and administrators, for ever, and in case *Charles Mundy* should not be living at his decease, or should die in the life of his (the testator's) wife, then to release, &c. his said real and personal estate, with all the arrears, according to the appointment of his wife by will, in which event he gave her power to make such will and disposition of all such real and personal estate. The testator appointed his wife and *Golding* executors.

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The testator, *Hugh Mundy* the younger, died in 1782, without leaving issue: leaving his wife and brother surviving. *Charles Mundy* died in 1795, without issue, and not having done any act to bar the intail. *Mary*, the widow of *Hugh Mundy* the younger, married *Henry Church*; and they filed the bill; praying, among other things, that the Plaintiff *Mary Mundy* may be declared entitled under the will of the testator, *Hugh Mundy* the younger, to the reversion of the copyhold estates, expectant upon the death of *Charles Mundy* without issue.

The testator, *Hugh Mundy* the younger, had not made a surrender to the use of his will. The fact, whether he had any freehold estate, that could be the subject of devise, was disputed. All the other relief was abandoned at the hearing.

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The Steward of the Manor of *Barking* by his depositions stated, that copyhold estates in that Manor may be limited in tail, with remainders over; which may be enjoyed upon failure of issue of the tenants, holding in tail; unless such estates tail are barred by surrender or recovery in the Courts of the Manor. The deponent further stated, that *Charles Mundy* held to him, and his heirs, of the Lord of the Manor, customary tenements in *Great Ilford*, within the said Manor; and it appears, *Hugh Mundy*, the younger, was upon the death of *Charles* admitted to the said premises as his heir. He also stated, that the custom of barring estates tail and remainders in the Manor of *Barking* is by surrender, and recovery suffered in the Courts of the

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Manor; and it does not appear by the Court Rolls, that any surrender was made, or recovery suffered, by *Charles Mundy* of his copyhold estates, held of the Manor of *Barking*. The deponent further stated, that he knows of no custom in that Manor, which requires a surrender to the uses of a will, in order to pass contingent remainders or reversions of copyhold lands in the Manor: such remainder or reversion being, as the deponent apprehends, an interest only, and not a tenancy in possession, so as to be the object of surrender.

Mr. Alexander, and Mr. Cooper, for the Plaintiffs.—Upon the question, whether the will of *Hugh Mundy*, the younger, passes the reversion in fee, expectant upon the determination of the estate tail of *Charles Mundy*, the objections are, that copyhold estate is not expressly given; and, that there is no surrender to the use of the will. In the instance of a devise to a wife, the intention being distinctly marked, the Court would supply the want of a surrender, admitting the distinction between that case and that of creditors; from whom the most general phrase is sufficient. That doctrine however applies only, where the testator ought to have surrendered to the use of his will: but where the surrender was not necessary, the effect of the words will be precisely the same, as if, when necessary, it was duly made. In some Manors it is usual to surrender even a reversion upon an estate tail; and where such a custom prevails, a surrender is necessary to enable the reversioner to devise. But in this Manor, according to the evidence of the Steward, there is no such custom: the reversioner, not being entitled to admission, cannot surrender: the reversionary estate in possession, surrendered; and any will, that is sufficient to pass personal estate, will pass copyhold estate: *Carey* v. *Askew*: (a) copyhold estate not being within the Statute of Frauds. (b)

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Mr. Richards, and Mr. Roupell, Mr. Cobbinque, Mr. W. Agar, and Mr. Parker, for the Defendants.—According to the general Law of Copyholds the reversion may be admitted; and may surrender. But it is enough to say upon this will, that, the testator having freehold estate, as well as copyhold, these words will not reach the latter; which is not surrendered; and, if there is freehold estate, will not pass by general words. *Byas* v. *Byas*. (c) *Gibson* v. *Lord Montford*. (d)

Mr. Alexander, in *Reply*, inforced the proposition, that, though copyhold estate, under such circumstances as to be the subject of a surrender, if not surrendered, will not pass by general words, that is confined to that case; and an equitable estate, a reversion, or any other species of inte-

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(a) 2 *Bro. C. C.* 58. (b) Stat. 29 *Ch.* 2. *c.* 3.
(c) 2 *Ves.* 164. (d) 1 *Ves.* 485.

rest, which cannot be the subject of a surrender, will pass by general words; whether there is freehold estate, or any other interest, upon which the words may operate, or not. 1806. CHURCH v. MUNDY.

The MASTER *of the* ROLLS desired to have authority in support of that proposition; observing, that the surrender shows an intention to pass the estate; but no inference can arise from doing nothing, where it is not necessary to do any thing. If there is no surrender, intention is out of the question. The will does not pass the copyhold, if not surrendered.

For the Plaintiffs, *Car* v. *Ellison*, (*a*) and *Greenhill* v. *Greenhill*, (*b*) were cited: but it was admitted, that Lord *Hardwicke* reasoned upon the particular circumstances. *June* 19.

The MASTER *of the* ROLLS.—In this case the only question, that was argued, is whether the Plaintiff, *Mrs. Church*, is entitled under the will of her first husband, *Hugh Mundy* the younger, to the copyhold estate, in which he had a reversionary interest, subject to the estate tail of his brother *Charles Mundy*. It is admitted, that no surrender whatsoever was made by *Hugh Mundy*, the younger, of any copyhold estate; and it is maintained by the Plaintiffs, that no surrender could be made; as he had only a reversionary interest; and that interest, like an equitable interest, might pass by a will without any surrender. No authority, establishing that proposition, has been cited; and I take the law to be otherwise settled by *Gyppin* v. *Bunney*, (*a*) *Annesley* v. *Annesley*, (*b*) and many other cases; establishing, that, the admittance of the particular tenant being an admittance of the remainder-man, the latter may pass his interest by surrender. *June* 23. [431]

In this instance, according to the evidence of the Steward, *Charles Mundy*, who was only tenant in tail of the copyhold, was admitted as tenant in fee. But that makes no difference whatsoever: the admittance, in whatever terms made, always enuring according to the title: *Charles* therefore being only tenant in tail, and his brother *Hugh* having the remainder in fee, it operated as an admittance of *Charles* to his estate tail, and of *Hugh* to his remainder. There was no surrender of the remainder in fee to the use of the will. Of course it does not pass.

(*a*) 3 *Atk.* 73. (*b*) 2 *Vern.* 679. *Prec. Ch.* 320.
(*a*) p. 431. *Cro. Eliz.* 504. (*b*) p. 431. *Cro. Jac.* 31.

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The question then is, whether, this being the case of a wife, the want of a surrender is not to be supplied. That depends upon the point, whether according to the true construction of this will the intention of the testator was, that this estate should pass. My opinion, independent of the consideration, whether there is, or not, any freehold estate, to which the words could apply, is, that it clearly appears not to have been the intention of this testator to comprehend this reversionary interest in the copyhold: and that from the mode, in which the limitation is expressed, by very general words, giving all the residue of his real and personal estate to his wife for life, and after her decease to his brother *Charles Mundy* in fee, the testator clearly could not intend to comprehend in that devise any estate, but such as his wife might first take for life, and *Charles Mundy* might [432] enjoy afterwards. It is impossible, that this copyhold estate could be taken in that order: for until the death of *Charles*, and without issue, the reversionary interest could not fall in. Afterwards, it is true, he makes a provision for the death of *Charles* in the life of his wife; but in that event disposes only of his "said real and personal estate." That is the estate his wife was intended to take for life, before his brother *Charles* could enjoy it; which could not be an estate, that she could not take till after the death of *Charles*. It seems therefore from the limitation, that the testator could not intend to include in the devise this reversionary interest.

In *Roe* v. *Avis* (*a*) a similar construction was upon a similar principle given to a residuary devise. The residuary words were large enough to include every possible interest. But it was held, that a reversionary interest did not pass on account of the application of the residuary estate directed; showing, that the testatrix could not have had in contemplation that remote reversionary interest.

My opinion therefore is, without any inquiry, which otherwise would have been necessary, that it was not the intention of this testator to comprehend in this residuary disposition this reversionary interest in the copyhold estate. The consequence is, the whole of the bill must be dismissed; and it must be dismissed with costs; for the bill is much encumbered with demands, which it was found impossible to support.

Bill dismissed with costs.

(*a*) 4 *Term Rep* 605

1806.

ROLLS.
June 26.

WIMBLES v. PITCHER.

Under a residuary bequest to "the "next of kin "in equal de- "gree," brothers entitled, excluding nephews and nieces.

THOMAS WIMBLES by his will, giving some part of his real estate to two of his nieces, one of whom was the daughter of one of his surviving brothers, in fee, as tenants in common, gave all his personal estate, and the residue of his real estate, to his executors, upon trust to sell, and pay his legacies. The testator then gave several legacies to his brothers and their children, and others of his nephews and nieces, children of deceased brothers and sisters; and he gave and bequeathed the rest, residue, and remainder, after paying all his testamentary and funeral expenses, in the following terms:

"To my next of kin in equal degree share and share "alike."

The bill was filed by the two surviving brothers of the testator, and the infant child of one of them, a legatee of 30*l.*, for an account, and a declaration as to the residue: which was claimed by the testator's brothers exclusively.

Mr. Richards, and Mr. Cooke, for the Plaintiffs, the Brothers of the Testator, contended, that the words, in which this residuary disposition is expressed, amount to a nomination of the testator's brothers; and that he was aware of, and intended to prevent, the effect of the Statute: *(a)* the plain meaning of the words "in equal degree" as a description of relations, is nearest relations; which description the nephews and nieces would answer if the brothers were dead. [434]

Mr. Johnson, for Defendants, children of deceased Brothers, insisted, that the distribution should be according to the Statute; and that, the brothers being particular legatees, the testator would, if he intended his brothers to take the residue, have given it to them expressly.

The MASTER *of the* ROLLS.—The question is, what the testator meant by the words, "in equal degree." Upon the Defendant's construction those words must be left out. Unless some meaning and operation are given to them, they must be struck out of the will. The nephews and nieces are entitled under the Statute by representation, not as in equal degree. No distinction arises from the circumstance, that the brothers are named as legatees, for they are all named.

Declare, that the Plaintiffs, the surviving brothers of the testator, are entitled, as next of kin in equal degree within the intention of this will.

(a) Stat. 22 & 23 *Ch.* 2. c. 10. 29 *Ch.* 2. c. 3.

1806.

ROLLS.
June 27.

PALEY v. FIELD

Surety for indemnity to a limited amount, having paid to the extent of his engagement, entitled to dividends upon proof by the creditor under the Bankruptcy of the principal debtor; subject (*Ex parte Turner*, *ante*, vol. iii, 243.) to a deduction of the proportion of dividend upon the residue of the debt proved, beyond that, for which the surety was engaged, supposing that expunged.

The surety not entitled to the benefit of proof against other estates upon a distinct security.

RICHARD PALEY and the Plaintiff *John Green Paley* executed a joint bond, dated the 24th of *December*, 1799, to the Defendants, who are Bankers, in the penal sum of 3000*l.*; with condition, reciting that *Richard Paley* had kept an account with the Defendants, as his Bankers; and to secure the repayment of all and every such sum and sums of money, as then had been or should hereafter be advanced by them to *Richard Paley* or his partners; he, and the Plaintiff as his surety, agreed to give their joint bond; and it was declared, that if they, or either of them, should pay all such sum and sums of money, as the Bankers either had, or should, or might, at any time hereafter pay, advance, or disburse, with interest and commission, on account of or for the use of *Richard Paley*, or any person in partnership with him, whether by bill of exchange or otherwise, and also if *Richard Paley* and the Plaintiff, or their heirs, executors, or administrators, should from time to time upon demand pay to the Bankers all such other sum and sums of money as then were or should be due or owing by *Richard Paley* or other persons as aforesaid to the Bankers, or in any other manner, or upon any other account whatsoever, then the obligation to be void; with a proviso, declaring that the Plaintiff, his heirs, &c. should not be answerable for, or liable to pay, by virtue of the condition of the said bond, on account of *Richard Paley* or his partners, as aforesaid, his heirs, &c. any sums of money to a larger amount than the sum of 1500*l.* with interest from the time the same should be demanded; the meaning of the parties being, that the Bankers should not [* 436] be indemnified by the Plaintiff by virtue thereof, for any loss which they should sustain by giving credit to *Richard Paley*, or any partner with him, as aforesaid, beyond the sum of 1500*l.* and interest, any thing therein contained to the contrary notwithstanding.

In *May*, 1803, a Commission of Bankruptcy issued against *Richard Paley*. The Defendants were admitted under that commission, as creditors upon the bond to the amount of 3000*l.* They also proved under a commission against *Smith* and *Ashton*, upon bills of exchange, drawn by *Richard Paley*, and accepted by them. Upon the 18th of *January*, 1804, the plaintiff paid the Defendants the sum of 1500*l.*, with interest from *July* preceding; at which time they made the demand. A dividend of 2*s.* in the pound was received by the Defendants under the commission against *Richard Paley*. They also received dividends of 3*s.* 6*d.* under the other commission.

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The bill prayed an account of the dividends received under both Commissions; and that the future dividends may be assigned to the Plaintiff.

The Defendants by their answer insisted, that they were entitled to apply the sum of 1500*l.*, received from the Plaintiff, as far as that will extend, to satisfy the loss they may ultimately sustain by the Bankruptcy of *Richard Paley*; and that they are entitled to receive and apply the dividends paid upon the whole debt, proved by them under the commission, until they shall receive full satisfaction upon the debt due to them from *Richard Paley*; which, including the bond, exceeded 8000*l.*; for which sum they were admitted creditors.

They represented, that the bills, accepted by *Smith* and *Ashton*, had no connexion with the bond, executed by the Plaintiff, except as they were securities for the general account of *Richard Paley*. [437]

Mr. Richards, and Mr. Huddlestone, for the Plaintiff.— If this had been a single transaction, there can be no doubt that the obligees in the bond, having received the dividends, would be trustees for the surety; who paid the debt. It happens however that the obligees have an ulterior demand beyond the sum of 1500*l.* But the principle is the same. Recovering the sum of 1500*l.* from the surety, and proving under the Commission a debt, including that sum, they must apportion the dividends, so as to give the surety his proportion of the dividend upon the whole, so proved: the right of the surety to a proportion of the dividend standing upon the same principle as his right to the whole, if there was no further debt.

Great difficulty arises upon this point from the case *Ex parte Turner*, (*a*) in which Lord *Loughborough* decided, that the principal creditor has a right to the proportion of the dividend, which he would have received upon the residue of his debt, if the debt for which the surety was answerable, had been expunged. That case is not supported by principle, and is disapproved by Lord *Eldon* in *Ex parte Rushforth*. (*b*) Lord *Loughborough* gives no reason for his judgment; and that which is assigned by *Mr. Cullen*, (*c*) is not satisfactory. Suppose the surety should not choose to come in under the Commission; and he is not bound to come in; the Bankrupt might be compelled to pay the debt twice: first by dividends under the Commission, and afterwards the whole to the surety. Lord *Eldon* said, the case *Ex parte Wildman* (*a*) decided only, that a bill holder has a right of action against the drawer, acceptor, and indorsers; and may go against all until he has re- [438]

(*b*) *Ante*, vol. iii 243. (*b*) *Ante*, vol. x. 409.
(*c*) *Cullen's Bank. Law*, 157.
(*a*) p. 438. 1 *Atk.* 100. 1 *Cooke's B. L.* 151.

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ceived 20*s.* in the pound; and that case and *ex parte Wallace* (*b*) are at variance. The Plaintiff's right to the dividend under the Commission against *Smith* and *Ashton* is also clear; unless the debt proved against their estate was a distinct, separate, independent, debt; not forming any part of the 1500*l.*

Mr. Alexander, and Mr. Bell, for the Defendants.—This is a very important point; for upon this argument, founded upon misapplication of a clear and established principle, there is no form of words by which a surety can contract an engagement for the deficiency to the principal creditor. Whatever may be the number of names upon a bill, the holder may prove against the estates of all who become Bankrupt, and may go against all who remain solvent, until he has received 20*s.* in the pound; and no one, paying part of the debt, can, while one shilling remains due, call upon the holder to assign the benefit of the security, or that charge upon any of the other estates, until the full amount has been paid to him. No such equity subsists in that case; and that proposition is not confined to the case of bills, extending to bonds also. The creditor is entitled to sue all the parties liable by the instrument; and no one, having paid a part, can call for an assignment of the proof against
[439] the others. This proposition, standing upon principle, and established by many authorities, as confined to cases, where the engagement of the surety is commensurate with that of the principal, is not the subject of dispute. It must also be admitted, that, where the engagement of the surety is perfectly separate and distinct, has no connexion with or relation to more extensive engagements of the principal with the creditor, the surety may have the benefit of the proof made by the creditor, though something remains due to him; and that is the utmost extent the argument in favour of the surety can go.

The case *ex parte Turner*, (*a*) is an authority in favour of the surety to that extent; though against him upon the subordinate question; to which, if that proposition should be determined in his favour, the creditor must resort. In that case the engagement of the surety was a transaction perfectly separate and distinct. Notwithstanding what he had done was connected with the demand for the general balance, due to the Bankers, his engagement was confined to the particular bills. Lord *Loughborough*, with some nicety, held him entitled to prove for those bills being paid the debt with reference to the creditor ought to be expunged, but, as the effect of that relief to the surety would be by increasing the dividend to diminish the fund, would not permit him to hold it to the prejudice of the creditor.

(*b*) 1 *Cooke's B. L.* 135. (*a*) *Ante*, vol. iii. 243.

by depriving him of the increased dividends, which he would have received, if the proof of that debt had been expunged. That authority therefore proves, that the right of the surety cannot stand in competition with the principal creditor. 1806. PALEY v. FIELD.

In all these cases however, in which this relief has been given to the surety, the engagements were perfectly commensurate; for though in that case the debt to the creditor exceeded the extent of the surety's engagement, the transactions were perfectly separate. It is said, but no authority is produced, that in a case of this nature the principle is the same. If the surety engages with the creditor in terms, which imply, that the advances of the creditor shall not exceed a specified amount, and the creditor does afterwards exceed that amount, the particular stipulation between the surety and the creditor might have the effect of limiting the demand, as between them; and that brings it to the ordinary case of a bill or bond, upon the acknowledged law; and that is the spirit of the decision in *ex parte Rushforth*; (a) in which case Lord *Eldon* followed *ex parte Turner*, upon the principle, that there was a stipulation between the Bankers and the surety, that the former should not advance more than the amount of the bond; and, as against the surety, they were not permitted to say, that more had been advanced. Perhaps some doubt may be entertained upon the justice of the inference, whether such was the nature of the stipulation. But whether that is so, or not, it clearly was the ground taken by Lord *Eldon*; that no more was to be advanced than the specific sum; and the surety should not by advances to a greater amount be deprived of all his equities. [440]

But in this case the stipulation is different. It was clearly understood, that larger advances were to be made; and the surety undertook to pay any deficiency, that might arise after application of all the effects, which the creditor might happen to have. The true construction of the proviso is, that the creditor should not be indemnified beyond the sum of 1500*l.* In such a case, the surety engaging to make good the deficiency, the creditor has not the benefit of his engagement, unless he is allowed to apply all other effects first, and then to come upon the surety for the deficiency. If in *ex parte Rushforth* (a) that was a breach of the stipulation, the stipulation in this case to that effect is express; that more advances were to be made; and the object of the bond with a surety was only to bring the Bankers home at last. It is said, that if the surety has not this benefit, the Bankrupt may be twice charged. In many situations the Bankrupt is exposed to that hardship; being liable after his [441]

(a) *Ante*, vol. x. 409. (a) p. 441. *Ante*, vol. x. 409

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estate has paid by dividend: but if that follows from the nature of security, the objection cannot have any weight.

In *ex parte Wood* (*b*) Lord *Thurlow* acted upon the distinction, that the payment was before the Bankruptcy, creating therefore a positive, substantive, debt at that time, distinguished in that respect from a payment after the Bankruptcy: in the one case a legal demand subsisting against the estate, in the other only the equity we are now discussing. If the proposition upon which this bill is filed, can be supported, Lord *Eldon* would not have determined *ex parte Rushforth* (*c*) upon the narrow ground, upon which that case is ultimately put, that in consequence of the want of notice the creditor had not a right to swell the demand beyond 10,000*l*. This case stands clear of that decision; which raises an inference, that in such a case as this the [442] surety has not the equity, insisted on by this bill. The effect of the engagement, contracted by this surety, is not merely to be liable for the first advances to the extent of 1500*l*., but an engagement of indemnity, to a limited amount, against any loss the Bankers might ultimately suffer. The proviso is to be understood, not as limiting the credit to the sum of 1500*l*., but as cutting down the extent of the engagement by the surety; meaning him to be liable to the extent of that sum, whatever advances may be made according to the condition of the bond. The whole must be taken together: the first engagement being unlimited in extent; but, taken with the proviso, amounting to a contract of indemnity to the extent of that sum; and in that respect distinguished from *ex parte Rushforth*; where Lord *Eldon* inferred, that the engagement was not to go beyond 10,000*l*. All these cases proceed upon the principle, that the debt would be gone, if not preserved by the equity of the surety. The proper mode therefore of trying the question is to consider, whether the Assignees could insist upon expunging the proof expunged; and the law is clear, that if various securities are held for one general debt, not separately applicable to particular parts, the Bankrupt estate cannot have any part of the proof expunged in consequence of the payment of any one of the securities; which are all liable for the whole. This is a security for the whole debt, not for a particular part.

The Plaintiff contends, that he is entitled not only to the dividends from *Paley's* estate, but also to dividends upon the bills accepted by the other Bankrupts. But that is a distinct transaction. They were separate, independent, sureties: the Plaintiff in respect of his bond: *Smith* and *Ashton* to the extent of their acceptances.

(*b*) Before Lord *Thurlow*, 12th *Dec.* 1791. Stated by Lord *Eldon*, *ante*, vol. x. 415. in *ex parte Rushforth*.

(*c*) *Ante*, vol. x. 409.

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Mr. Richards, in Reply.—Every suretyship is in truth a contract for indemnity. The surety might have compelled the Bankers to put the bond in suit for 1500*l.* The Bankruptcy cannot make a difference. The Plaintiff having been compelled to pay the whole sum, for which he agreed to be surety, and having a right of action, if no Bankruptcy had occurred, shall in Equity be allowed to claim as *cestuy que trust* to the extent of what has been received under the Bankruptcy; as in the event of no Bankruptcy he might have compelled the creditor to sue the principal obligor; or, having paid the whole, might have brought an action against the principal debtor. In the particular mode, in which this engagement is expressed, there is nothing to prevent the relief. The conclusion of the instrument brings it within the principle of *ex parte Rushforth*: (*a*) the stipulation being, that the Plaintiff shall not be answerable, or liable to pay, on account of *Richard Paley*, nor the Defendants be indemnified by the Plaintiff for any loss they should sustain by giving credit to *Richard Paley*, beyond the sum of 1500*l.*

June 30

The MASTER *of the* ROLLS.—I am not able to discover any substantial distinction between this case and *ex parte Rushforth*. (*b*) Indeed this is the stronger and clearer of the two; as this instrument marks more distinctly that the sum, for which the surety was to be answerable, was, as against him, to be considered as the whole amount of the creditor's demand. In that case there was no specified limit to the engagement, except what was implied by the obligation of the bond. The undertaking was to answer for all sums as the Bankers might make. Lord *Eldon* however deemed, from the obligation to give notice before there should be a forfeiture of the bond, that, as against the surety, the Bankers would not be entitled to say, they had given credit for more than the penalty: so as to affect him in any way by such additional credit. Here that is not left to inference; for the proviso, which qualifies and controuls all the rest of the instrument, declares expressly, that the true intent and meaning is, that the Bankers shall not be indemnified by the Plaintiff by virtue thereof for any loss which they should sustain by giving credit to *Richard Paley*, as aforesaid, beyond the sum of 1500*l.* and interest; any thing therein contained to the contrary notwithstanding. I hardly know how the parties could have more clearly provided, not merely that the Plaintiff should not be called upon to answer more than

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(*a*) *Ante*, vol. x. 409. (*b*) *Ante*, vol. x. 409.

1806. 1500*l.*, but that with regard to him the creditor should be considered as limited to that sum.

PALEY v. FRESH.

Then upon what ground is the equity, which the Plaintiff seeks by this bill, resisted? Upon this ground only; that these Defendants have given credit to the Bankrupt beyond that stipulated sum: a case with which, by express provision, the Plaintiff was to have nothing to do. If, in consequence of these ulterior advances, the Bankers are to keep dividends, of which they would otherwise be trustees for the Plaintiff, does not he contribute in effect to indemnify them for a loss, against which it is expressly provided that he shall not be called upon to indemnify them; *viz.* a loss occasioned by their advancing more than the sum of 1500*l.*? It is clear, that, as between these parties, that sum is to be considered as the amount of the debt. The law, [445] resulting from that view of the facts, is not a subject of controversy between the parties; for it is agreed, upon that statement the Plaintiff is entitled to the equity he seeks by his bill, to consider them as trustees for him of whatever dividends they draw from the Bankrupt's estate on account of this sum of 1500*l.* As to the other bills, I take it, that is a distinct transaction, and the Plaintiff has nothing to do with them.

The MASTER *of the* ROLLS enquired, whether in *ex parte Rushforth*, (*a*) the order allowed the creditors the equity that was given in *Ex parte Barrow*, (*b*) and, the order appearing to have allowed it, directed the decree in this cause with the same qualification

(*a*) *Ante*, vol. x. 409. (*b*) *Ante*

1806.

Ex parte CRANMER.

July 12. 18. 22.

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Return to a Commission of Lunacy, that the party is so far debilitated in his mind as to be incapable of the general management of his affairs, quashed; and a new Commission issued: a *"Melius Inquirendum"* not issuing in Lunacy.

The Commission of Lunacy applicable to incapacity from causes, distinct from Lunacy; (1) as old age: but the return, if not in the words of the Commission, must have equivalent words; and in such a case the proper return is, that the party is of unsound mind; so that he is not sufficient for the government of himself, &c.

Privilege of the party, who is the subject of a commission of lunacy, to be present at the execution. (2)

UNDER a Commission issued to enquire whether *Henry Cranmer* Esq. is a lunatic, the verdict, found by the jury, was, that *Henry Cranmer* is so far * debilitated in his mind as to be incapable of the general management of his affairs; and has been in the same state of mind for six months last past.

The return to this Commission was brought before the Lord *Chancellor* by two petitions: one presented in the name of *Mr. Cranmer*: the other by his next of kin. The affidavits stated several instances of the decay of this gentleman's faculties, appearing to be the effect of his advanced age.

Mr. Perceval, and Mr. Hart, in support of the Petition of Mr. Cranmer.—The finding upon this inquisition is so informal, that a traverse cannot be taken; the legal right to which is fully acknowledged in the cases *Ex parte Wragg*, *Ex parte Ferne.* (*a*) In *Ex parte Barnsley* (*b*) Lord *Hardwicke* notices the uncertainty arising from the latitude of these findings: the Court having departed from the rigid terms of the ancient form, "*lunaticus, vel non;*" and held, that the words substituted must be equivalent; as "*non compos mentis*," or, since the proceedings have been in *English*, "of unsound mind." A sort of particular technical phrase has therefore been adopted. But words denoting mere weakness of mind, upon which there may be different judgments, cannot be substituted for lunacy, or unsoundness of mind; which latter description has by usage obtained a legal technical import. In this case the traverse would be more involved than in any former instance, as to his capacity for the general management of his affairs.

The Solicitor-General, Mr. Richards, and Mr. Wetherell, for the next of Kin.—* If this verdict cannot be sustained, the proper course seems to be to direct a *melius inquirendum*. This is a subject of great importance with reference to future cases. It is perfectly settled, that his Majesty will interfere for the protection of persons, who are become in-

Order, that a person, against whom a Commission of Lunacy was established, should be delivered up to the committee.

Habeas Corpus not necessary.

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(*a*) *Ante*, vol. v. 450, 832. (*b*) 3 *Atk.* 168.

{(1) *In the Matter of James Barker*, 2 Johns. Cha. Rep. 232. See also, *Darling* v. *Bennett*, 8 Mass. Rep. 129.}

{(2) See *Chase* v. *Hathaway*, 14 Mass. Rep. 232.}

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capable of protecting themselves; though not lunatic in the strict sense: the incapacity proceeding only from debility of mind, arising from affliction, disease, or old age; who cannot be described as lunatics in the strict sense. The Court proceeds now, not upon the strict Common Law Writ, but upon a Commission in nature of it; under which the description is different from that in the writ. *Blackstone's* (*a*) definition of a lunatic, considered as a proper object of the interference of the Lord *Chancellor*, comprises those who are incapable of managing their own affairs. There are innumerable instances of Commissions, (*b*) the objects of which were clearly persons, not lunatic in the strict sense; the disorder arising from causes, that could not possibly admit lucid intervals: old age, for instance; a glimmering only of understanding left: a state produced by no sudden cause, but the gradual effect of time upon the mind.

Since the case *Ex parte Barnsley* the law of the Court upon this subject has altered, according to Lord *Eldon*; who in *Ridgeway* v. *Darwin* (*c*) says, he is pretty confident Lord *Hardwicke* would not have gone so far; but finding a course of cases, establishing this authority, and feeling a strong inclination to maintain it, or that the Legislature should take measures to preserve persons in a state of imbecility, laying them as open to mischief as insanity, till these decisions were reviewed, he would not alter them. If the law has been altered in this respect, that Commissions are granted in cases, in which Lord *Hardwicke* would not have granted them, and the Lord *Chancellor* will interfere upon having the facts of such cases ascertained, it would be extraordinary, that your Lordship should decline to interfere upon those facts, stated by the verdict of a jury; and should require them, upon their oaths, to state formally and technically a lunacy, or something equivalent in a case, where nothing of that nature exists: if a man is dumb, in the language of *Fleta*, "*mutus & surdus*," your Lordship is to force the jury to call him an ideot or a lunatic. The law is surely in a most inconvenient state, if the party is entitled to protection under circumstances that are not permitted to appear upon either the Commission or the inquisition; and the jury are placed under a necessity of saying, upon their oaths, that which they cannot say consistently with truth. It is to be regretted, that the Lord *Chancellor* has applied the prerogative to such circumstances: for the necessity of the case would have compelled the Legislature to interfere. Upon these affidavits the instances of loss of memory and

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(*a*) 1 *Black. Com.* 304.

(*b*) A long list of Commissions, in cases of this nature, within the last ten years, was produced.

(*c*) *Ante*, vol. viii, 65.

failure of intellect are such, as, if not to be characterized as lunacy, are a sure indication of a mind overturned. 1806.

The reply was stopped by the Court.

Ex parte CRANMER.

The Lord CHANCELLOR.—I rather regret, that it did not occur to me, that these petitions stood for this day; for it is fit that I should have collected my thoughts before I decide upon this very momentous subject. But, having no doubt upon it, I shall state my opinion. I think there ought [449] to be an Act of Parliament, not from any defect in the jurisdiction; but on the immense moment, that the Lord *Chancellor* should not assume an authority that does not belong to him by the ancient jurisdiction; and that may press sorely on the liberty of the subject; on the other hand, feeling, as Lord *Eldon* appears strongly to have felt, that persons, who are above all others entitled to protection, ought not to go unprotected. Another ground is this: A man may have passed a great and illustrious life; and by the course of nature his faculties may decay; so that he may not be fit either to govern himself, or his affairs. It is unseemly, that he should be put upon the footing of a lunatic; and that a Commission should issue in the ordinary course; which may affect the families of such persons in other times. It is supposed, and that opinion has gone forth very generally, that this unhappy disease runs into the posterity; and thence arises a grievous dilemma, that either such a person must be deprived of protection altogether, or in future times that distress to his family should be the consequence. Why should not a man be entitled to protection in this second state of infancy, as well as the first? The whole prerogative is this, that it falls to the King to take care of those who cannot take care of themselves.

Lord *Coke* says, in the records of Courts of Justice you are to find the [illegible], and if I find upon the records, that I have jurisdiction, though I do not see whence, to go beyond what Lord *Hardwicke* did, if upon some new jurisdiction, arising from the necessity of the case, a Commission can issue, I will exercise that jurisdiction. But let the Commission and the verdict be congruous upon the face of the record. That cannot be, unless the verdict is either in the words of the Commission, or in equipollent words. The right to traverse the verdict is admitted. Could the jury find [450] a special verdict, stating, that they could not say, whether he is a lunatic, or not; and returning the evidence back to me as other juries return the evidence to the Court; and could I upon a special verdict say, the man is a lunatic? I could not. I have no authority to act upon his liberty and his property, except upon a verdict expressed in legal words.

No special verdict upon a Commission of Lunacy.

Lord *Coke* in his Commentary upon *Littleton* states what embraces every possible case:

1806.

Ex parte CRAWSHAY.

Explanation of "*Non compos mentis.*"

"Here *Littleton* explaineth a man of no sound memory "to be *non compos mentis.* Many times (as it here appear-"eth) the *Latin* word explaineth the true sense; and calleth "him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stul-*"*tus*, or the like, for "*non compos mentis*" is most sure and "legal."

Lord *Coke* there considers the word "*lunaticus*" as by no means material; only classing it with "*amens*, *demens*," &c.: but he says, "*non compos mentis*" is the sure term. The Commentary proceeds thus:

"*Non compos mentis*, is of four sorts: 1st. *Idiota*: which "from his nativity by a perpetual infirmity is *non compos* "*mentis*: 2dly, He that, by sickness, grief, or other acci-"dent, wholly loseth his memory and understanding." *(a)*

[451] Here is the very man: not born without reason; but who has lost it from sickness, grief, or other accident; for

[452] you cannot enter into the mind; to know, by what means it is disorganized: but you find it disorganized; and who

(a) *Co. Lit.* 246. *b* See *Beverley's* Case, 4 *Rep.* 123; where the description is still more general and comprehensive "he, who was of "good and sound memory, and by the visitation of God has lost it."

It is singular, that the term "*Lunaticus*," which, though derived from a vulgar error, gives the title to the modern proceeding by Commission, and is the only specific description of afflicted persons contained in it, is not to be found in any form of the old writ, (*Reg. Brev.* 266,) nor in the Statute. (*De Prerogativâ Regis*, *Stat.* 17 *Ed.* 2. c. 9, 10.)

The first form of the writ, to the Escheator, suggesting, that the party, "Fatuus & Idiota existit ita quod regimini sui ipsius, terrarum, tenemen-"torum, bonorum, & catallorum suorum non sufficit," directs the inquiry, "Si A. fatuus & Idiota sit, sicut prædictum est, necne; & si sit, tunc "utrum a nativitate suâ, an ab alio tempore, & si ab alio tempore, tunc "a quo tempore, qualiter, & quomodo, & si lucidis gaudeat intervallis. "* * * * & quis propinquior hæres ejus sit, & cujus ætatis."

Another form of the writ, to the Escheator, recites, "Quia A. Idiota "& adeo impotens ac mentis suæ non compos existit, quod Regimini sui "ipsius, terrarum, vel aliorum bonorum, non sufficit," and then inquiry, "Si idiota sit, & mentis suæ non compos, sicut dicitur est, necne."

By another form the inquiry is, whether "Idiota fatuus existit a nativitate "suâ, an alio tempore."

According to another form the Sheriff is ordered to inquire, whether, &c. "a nativitatis suæ tempore semper hactenus purus Idiota extiterit "* * * * an per infortunium vel alio modo in hujusmodi infirmitatem "postea incidit, * * * * * et si per infortunium vel alio modo, tunc "per quod infortunium, & qualiter, & quomodo, & cujus ætatis fuerit."

By another form the Sheriff is to inquire, whether "a primevâ ætate "suâ fatuus extiterit."

In the writ, entitled, "De Idiota coram Consilio," the description is, "Idiota est & non sanæ mentis existit."

It is to be observed, that the language of the Writ, supposing a commencement and cause of the calamity unconnected with birth, does not correspond with the description of an idiot, generally received, and adopted by Lord *Coke*.

The inquiry at the close of the first of these forms, being literally translated in the Commission of Lunacy "who is his nearer heir *and of* "*what age*," is in practice referred to the age of the heir. That doubtful construction is the more questionable, as another form of the writ by very clear expression applies that inquiry to the person, who is the subject of the Commission.

1806.

Ex parte CRANMER.

In cases of Lunacy, the notion, that the moon has an influence, erroneous.

can say I have not a jurisdiction? There is no doubt the moon has no influence; and there are many persons, who never have lucid intervals that come within this second description. But they must have lost their understanding to this extent; that they are not capable of the management of themselves and their affairs. Lord *Coke* is so far from putting the person he describes by the term "*lunaticus*" in the class, that I have just noticed, that he puts that person by himself; describing him to be a man, who hath sometimes his understanding, and sometimes not; and this is the ancient law of the country. This is not a man, who has sometimes understanding, and sometimes not: his understanding is defunct: he has survived the period that Providence has assigned to the stability of his mind. In the remainder of this part of the Commentary Lord *Coke* continues to use the phrase "*non compos mentis*."

Upon this the jurisdiction (which God forbid should not exist in such cases) is clear; and the necessity for an Act of Parliament is, not to give jurisdiction, but to avoid the inconvenience I have hinted at.

Let us see, whether any thing has since occurred, which can alter the law. Lord *Hardwicke* (and I am glad, whenever I have a precedent by that great man) in *Ex parte Barnsley* (*a*) says expressly, that was the law in his time; and there must be equipollent words. Another great authority, Lord *Eldon*, in *Ridgeway* v. *Darwin* (*b*) says, Lord *Hardwicke* would not have gone so far as the late practice has gone. Nothing was decided in that case. Lord *Eldon* did not issue another Commission, but did what was perfectly wise; directing two physicians to visit the lady, for the purpose of determining, whether her state of mind was competent to the management of her affairs; declaring, that the case did not seem a case of insanity; and he should think himself bound to do that, if it was only made out, that it was not fit, she should have the management of her pecuniary affairs; and Lord *Eldon* puts the ground, on which he goes in the disjunctive; *viz.* feeling a strong inclination to maintain the practice, or, that the Legislature should take measures to preserve persons in a state of imbecility, laying them as open to mischief as insanity. [453]

If upon the evidence this gentleman shall prove a proper subject for a Commission, I am sure, there is sufficient to bring him within the most legitimate class: *viz.* the 2d class mentioned by Lord *Coke*: those, who from sickness, grief, accident, *or old age*, (*c*) (for that may be added,) have lost their understanding. What is the meaning of that? In the

(*a*) 3 *Atk.* 168. (*b*) *Ante*, vol. viii. 65
(*c*) See *Beverley's* Case, 4 *Rep.* 123

1806. case of the unfortunate man (1) who fired at the King in the theatre, *The Attorney-General* (2) contended, that he ought to be proved to have wholly lost his understanding. So he had: but that does not require such a state, that he could not see the light of the sun, or know his father. But the [454] inquiry is, whether his capacity is of that kind, that fits him for the government of himself, and the management of his affairs. I must have that returned. This verdict does not state distinctly, that he is incapable; but that he is so far debilitated in his mind, that he is not equal to the general management of his affairs. How dangerous is that! Lord *Eldon* was aware of it; observing, that many difficult and delicate cases with reference to the liberty of the subject might occur. I will protect this gentleman, by granting a *melius inquirendum*, to see, whether he is fit for the government of himself, and the management of his affairs. How can I tell, what is *so far* debilitated in his mind as not to be equal to the general management of his affairs? Suppose he was a farmer, and his understanding was so far debilitated, that he could not manage his farm, though competent to common purposes. There is an ambiguity in this verdict, upon which it cannot possibly be sustained.

Ex parte CRANMER.

Quash the inquisition, and let another inquisition be directed

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July 18 An application was made, that a new Commission should issue in this case; upon the ground, that upon search it appeared, a *melius inquirendum* had never been directed in lunacy; and in *ex parte Roberts* (a) it is stated, that it cannot be.

The Lord CHANCELLOR.—I hear no objection to a new Commission; for this gentleman has been found lunatic in fact, and if upon the finding I could see, that he was [455] not a proper object of this Commission, as the law now stands, though I wish, there should be a revision of it as to that, I might have said, there was an end of the Commission; and I would not grant another. But there is in this return what convinces me, that there is great probability that he is a legitimate object of a Commission. This verdict could not support the Commission: but I see plainly,

(a) 3 *Atk.* 5.

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(1) *James Hadfield.* See Lord *Erskine's* Speech upon that occasion in *Ridgeway's* Speeches of Lord *Erskine*, vol. i p. 495. (*Amer. Edit.*)

(2) Lord *Redesdale.*

at least that there is not sufficient certainty of his capacity. The jury will find either in the words of the Commission, or in equipollent words I perfectly agree with Lord *Eldon* in the idea his Lordship had of *Charlton Palmer's* case.

1806.

Ex parte CRANMER

The party certainly must be present at the execution of the Commission. It is his privilege.

Another Commission issued accordingly; under which upon the evidence, and particularly the personal examination of *Mr. Cranmer*, the Counsel, who resisted the Commission, gave it up, and the jury under the direction of the commissioners found their verdict, that *Henry Cranmer* is of unsound mind, so that he is not sufficient for the government of himself, his Manors, &c., and that he has been in the same state since the 13th of *May* 1806.

Under the return of that verdict, a committee of the person was appointed by the Master.

The Solicitor-General, and Mr. Wetherell, on behalf of the Committee, applied to the Lord *Chancellor* for an order for delivering the person of *Mr. Cranmer* to the committee; stating, that on the morning after the execution of the Commission *Mr Cranmer* had been conveyed from his house in *Essex* to *London* by *Margaret Winton*, that they had been traced to his house in town; but he had been conveyed from thence, and it was not known whither. They stated, that a petition was not yet presented, the Commission having been executed only on the 29th of *July*; and observed, that an order might be made, that *Mr. Cranmer* should be delivered up to the committee, or, as in the case of an infant, should be produced in Court, that *Mr. Cranmer* must be considered as under the protection of the Lord *Chancellor*, and a *habeas corpus* is not necessary.

July 31

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The Lord CHANCELLOR said, a *habeas corpus* was not necessary; that he should certainly make the order; and, if it was not obeyed, should commit the parties.

The order was immediately pronounced, that *Mr Cranmer* should be delivered by *Margaret Winton*, or any other person, in whose custody he may be, to the committee, or any person appointed by him.

Under that order *Mr. Cranmer* was afterwards delivered to the committee

1806.

July 8.

NEWHOUSE v. MITFORD.

Order on motion with consent to rectify a clear mistake in a decree. (1)

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IN this cause the decree directed the defendant *William Mitford* to transfer certain funds, admitted to be standing in his name, into the name of the Accountant-General, &c. with the usual directions for the appointment of a guardian for the infant Plaintiff, and an inquiry as to maintenance; and the Master was ordered to tax all parties' costs, to be paid by sale of part of the fund; and that the dividends to accrue upon the residue, after payment of what should be allowed for maintenance, &c. be from time to time laid out in the name of the Accountant-General, in trust in the cause, with liberty to apply, when the infant should attain the age of 21.

After this decree had been passed and entered, a motion was made for a reference to the Master to take an account of the dividends, received since the death of the testator by the Defendant *Mitford* upon the funds, directed by the decree to be transferred; with the consequential directions, that what shall be reported due from him on that account may be paid into the bank, &c.

Mr. Kenrick, *in support of the Motion*, cited *Wallis* v. *Thomas*, (*a*) and *Packard* v. *Matthewson*. (*b*)

The motion was not opposed on the part of the infant; and all the other parties consented.

The Lord CHANCELLOR made the order; observing, that it was a mere slip. (*c*)

(*a*) *Ante*, vol. vii. 292. (*b*) *Ante*, [illegible]

(*c*) See the next case.

(1) *Lawrence* v. *Cornell*, et al. 4 Johns. Ch. Rep. 415.

1806.

LANE v. HOBBS (1)

July 8.

Order on motion with consent, to rectify a clear mistake in a decree. It must be a separate, supplemental, order.

IN this cause a motion was made, as in the preceding case, to rectify an error in the decree, passed and entered; the decree directing money to be paid into Court, which had been paid in.

Mr. Heald, in support of the Motion, mentioned the authorities cited in the preceding case, *Newhouse* v. *Mitford*.

The Lord Chancellor made the order; stating, that it must be done by a separate supplemental, order.

JACOB v. HALL.

July 5.

Amendment permitted after answer, without prejudice to exceptions, by praying injunction, upon a devastavit, and a purpose of collusive sale by the executrix, a person of no property, to the trustee. The amendment confined to the prayer of the injunction.

THE bill, filed on the 23rd of October 1805, by persons, claiming under the will of the testator, to have the testator's real accounts, and a re- [*459] ... the defendants, on a motion was made on the part of the Plaintiff, that they may be at liberty to amend their bill by praying an injunction, to restrain the Defendant *Sarah Hall*, the executrix, and the other Defendant *Hughes*, a trustee, named in the will, from selling the leasehold estates of the testator, without previous notice to the Plaintiff's taking exceptions to the answer.

The bill and the affidavit in support of the motion represented that the testator was possessed of property, and ... by the improvident sale of the farming ... and otherwise with the assets, for the purpose of ... the leasehold premises, at a undue, concern; and alleged, that by any sale the Plaintiffs will sustain great loss and injury.

The Solicitor-General, and Mr. Heald, in support of the Motion.—*Mr. Richards, and Mr. Heald* for the Defendants, desired, that the motion should stand over; the affidavit not having been filed in time.

The Lord Chancellor made the order; confining the amendment to the prayer of the bill, and to the single object of the injunction. (*a*)

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(1) Cited, 1 John. Ch. Rep. 416.

1806.

July 7.

PEARCE v. BARON.

Payment in part of a legacy ordered on motion with consent; the fund admitted to be ample.

A MOTION was made, that the sum of 2000*l.* should be paid to a legatee, in part of the legacy without prejudice to the question, out of what fund the legacy is to be paid.

The bill was filed by trustees, to have the accounts taken, &c. and the ground of this application was, that there was a clear surplus; the trustees, and all other parties competent, consenting; and no opposition on the part of the infants.

Mr. Hart, in support of the Motion.—This object has been obtained in this way, where there is no doubt, that the [460] fund is ample; and that is made evident by the consent. In a case of this sort, *Coffin* v. *Cooper*, (*a*) your Lordship, following an order made by Lord *Eldon*, ordered that 500*l.* should be paid to the testator's widow; and *The Master of the Rolls* has acted upon those orders; and given 500*l.* to one of the sons. That was, as this is, a suit instituted by the trustees; and was a stronger case, for this legatee is in the situation of a creditor, taking, not under the testator, whose infant son is entitled to the estate, but from the testator, from whom the estate goes to the father of that infant. There are certainly creditors paramount: there is, however, no doubt, that the fund is amply sufficient; and in such a case it is not proper to put the family to the delay and expense of a separate report.

The Lord CHANCELLOR.—The case cited is certainly in point. In that instance there was a very extensive trade, and it might have been difficult to collect the debts. This can never be done, where it is a measuring cast. There must be a clear, obvious surplus, admitted by those who are interested to object, and the ground is, that they would not give a consent, that would involve them in all the responsibility that would arise, where creditors are outstanding, and the fund is scanty.

Ordered.

(*a*) In Chancery, 26th *March* 1806.

1806.

ROLLS.
July 7.

STENT *v.* ROBINSON

No exception in favour of a wife, as for a child, to the rule, that a legacy does not bear interest, before it is payable.

Claim of *5l. per cent.* upon a legacy, as being given out of a capital in trade, not decided.

IN this cause the testator bequeathed to trustees 10,000*l.* out of the capital in trade, which he might die possessed of, to be vested by them with the concurrence of his wife in such funds and securities as should be deemed eligible; in trust to pay the interest to his wife half-yearly during her life, for her separate use. The will also gave her other interests.

The widow married again; and a petition was presented by her and her second husband; praying, that the Master may be directed to allow interest upon the legacy of 10,000*l.* at *5l. per cent.* from the 12th of *July*, 1797, the day of the testator's death, until it should be laid out in stock; and from that time the dividends, and that upon another fund interest may be allowed at 4*l. per cent.* from the testator's death.

Mr. Wyatt, in support of the Petition, cited the *dictum* (*a*) of Lord *Alvanley* in *Crickett* v. *Dolby*; and contended that the interest should be *5l per cent.* upon the fund of 10,000*l.*; being money in trade.

Mr. Alexander opposed the Petition; insisting that Lord *Alvanley's* opinion could not be maintained.

The MASTER *of the* ROLLS dismissed the petition; observing, that there is nothing to support it except that *dictum* by Lord *Alvanley*, and there is no authority to support that, notwithstanding the numerous instances of legacies to wives.

(*a*) *Ante*, vol. iii. 16.

[462]

July 7, 8.

RICHARDS *v.* CHAVE.

The Court of Chancery will not interfere by appointing a receiver upon the mere ground, that two wills are in controversy in the Spiritual Court; and no special

THE bill stated, that *Mary Chave* by her will, made according to a power given by her marriage settlement, after some specific devises and bequests, gave all the residue of her real and personal estate to the Plaintiff. The Defendants, the husband of the testatrix, the trustees in the settlement, and other persons, claiming under a prior will, entered a *caveat*; disputing the validity of the will. The bill prayed an account of the personal estate of the testatrix; and, that, pending the suit and proceedings in the Ecclesiastical Court, the clear residue, after payment of

case, as that the property is in danger, and cannot be secured by administration *pendente lite*.

1806.

RICHARDS v. CHAVE.

debts and funeral expenses, may be preserved under the direction of this Court, for the benefit of such parties as shall ultimately appear entitled thereto; that a receiver may be appointed; and that the Defendants may bring the settlement into Court.

The Defendants by their answer insisted, that the testatrix was not of sound mind at the date of her supposed will; and that undue advantage was taken of her.

Mr. Thomson, in support of the Motion for a Receiver, relied on the passage, (*a*) stated by Lord *Redesdale*, and the case of *King* v. *King*; (*b*) insisting that this Court will, of course, protect personal estate, while the subject of dispute in the Ecclesiastical Court.

[463] *Mr. Bell, for some of the Defendants; The Solicitor-General and Mr. Heald, for the Husband.*—This is an application by a person, whose title is disputed, to take the property from the trustees under the marriage settlement; one of whom was appointed by the testatrix herself. It is said to be of course in this Court to protect personal estate while it is the subject of dispute in the Ecclesiastical Court: but that Court may appoint an administrator *pendente lite*: *Wills* v. *Rich*. (*c*) In *Knight* v. *Duplessis*, (*b*) Lord *Hardwicke* refused to interfere. There certainly are cases, upon which this Court will interpose: for instance, where the will having been proved by the executor, a question is made whether the probate shall be revoked; for under those circumstances the Spiritual Court will not grant administration *pendente lite*; and then this Court, if a case is made out, that the executor is not a proper person to be trusted, will appoint a receiver: perhaps also in another case, where the parties in whose hands the property is, appear by the answers to be insolvent, but it is by no means of course. In this instance there was nothing to prevent an administration *pendente lite*. It is uncertain whether this Plaintiff, claiming under a will that is the subject of dispute in the Ecclesiastical Court, will ever be entitled.

Mr. Thomson, in Reply.—This case cannot be distinguished. In various cases this Court will interfere upon the mere ground of preserving the property; as pending an ejectment this Court will prevent cutting timber; and that it will interfere upon a dispute in the Ecclesiastical Court

[464] is plain upon *King* v. *King*. (*a*) This is the very case put in all the books; a contest, who is the representative. When this Plaintiff's right is established, these trustees will have no right to interfere with the property; and he is entitled to consider it in danger in the mean time. The appointment of a receiver is for the benefit of all parties; whoever

(*a*) *Mit.* 122. 3. (*b*) *Ante*, vol. vi. 172.
(*a*) p. 463. 2 *Atk.* 285. (*b*) p. 463. 1 *Ves.* 321.
(*c*) p. 464. *Ante*, vol. vi. 172.

may be ultimately entitled. Though the Ecclesiastical Court might interfere, that is no objection to the interference of this Court, having more power to protect the property. 1806. RICHARDS v. CHAVE.

The Lord CHANCELLOR.—This is not like the cases, in which the Court, upon the probability of irreparable mischief, interferes, upon affidavits, by injunction to prevent it. This Plaintiff comes here upon a universal proposition; that a residuary legatee and executor, going to the Spiritual Court for probate, which will give him the legal title, if a litigation arises there upon a prior will, may immediately under all circumstances, without any proof of danger to the property, or, that he cannot have an administration *pendente lite* to secure it, have a receiver appointed. That proposition must, I think, have some qualification. In *King* v. *King* the Spiritual Court, having decided against one will, went a considerable way in favour of the other. The party therefore came to the Court with a very strong case. This Court ought never to interfere, where the Spiritual Court can grant an administration *pendente lite*; and that was Lord *Hardwicke*'s opinion.

Mr. Leach (Amicus Curiæ) said, he was counsel upon the last case of this kind, *Liddell* v. *Liddell*. Time had been allowed in the Spiritual Court to appeal. An application was made, before that time expired; and the Spiritual Court would not grant either probate, or an administration *pendente lite*; as the time for the appeal was not out; and upon that refusal the application was made to this Court on affidavit before answer. [465]

The Lord CHANCELLOR refused to appoint a receiver; observing, that upon all the authorities, particularly what is said by Lord *Hardwicke* in *Knight* v. *Duplessis*, (a) this Court cannot interfere, merely upon the circumstance, that two wills are in controversy in the Spiritual Court. In *Liddell* v. *Liddell* the Spiritual Court could not protect the property. *July* 8.

(a) 1 Ves. 321.

1806.

July 18.

M'MAHON v. SISSON.

Order to dismiss for want of prosecution regular, according to the practice; though the Six-Clerk's certificate appeared on the face of the order to be of a subsequent date.

AN order having been obtained by the Defendant to dismiss this bill with costs for want of prosecution, a motion was made to discharge that order for irregularity. The objection was, that the order bore date prior to the Six-Clerk's certificate; the former the 1st of *June*, and the latter the 5th; which appeared upon the face of the order. The order was drawn up on the 5th of *June*, and the Plaintiff was served on the 6th.

The Solicitor-General, and Mr. Plowden, in support of the Motion, pressed the circumstance, that this objection appeared on the face of the order: showing, that * the order ought never to have been made; the certificate, upon the existence of which it is expressed to be made, not then having existence; observing, that in *Wills* v. *Pugh* (*a*) Lord *Eldon's* doubt upon this point went only upon the practice.

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Mr. Girdlestone, for the Defendant, relied upon the practice; and observed, that this motion had been refused by the Lord *Chancellor* at his Lordship's House, immediately after the term, and was twice refused by Lord *Eldon*.

The Lord CHANCELLOR refused to make the order; saying, he had decided the point upon full consideration, and could not grant it against the course of practice, acknowledged in the case referred to.

(*a*) *Ante*, vol. v. 402

1806.

ROLLS.
July 11. 26.

BLAGDEN *v.* BRADBEAR.

Sales of land by auction are within the Statute of Frauds; (1) except sales under decree. Auctioneer's receipt for the deposit, not containing expresly or by reference the terms, *viz.* the price, cannot have the effect of an agreement, binding the vendor, within the Statute of Frauds. (2) Defendant insisting upon the Statute of Frauds, admissions by the answer are immaterial. (3)

THE Bill prayed a specific performance of an agreement for the purchase of a freehold estate, belonging to the Defendant; which was sold by auction, and knocked down to the Plaintiff, who was the highest bidder, at the sum of 805*l.* Among other usual conditions of sale it was stipulated, that the purchaser should pay a deposit of 15*l. per cent.*, and sign an agreement for payment of the remainder of the purchase-money on or before the 10th of *October* 1805; and that half the duty should be paid by the purchaser, and half by the seller.

The answer, admitting the conditions of sale, denied that the auctioneer was authorized by the Defendant to sign any memorandum or note in writing concerning the estate, or any receipt for money; and stated, that, so far from having given such authority, the Defendant immediately before the sale told the auctioneer, that 1000*l.* was the lowest price, at which he would suffer it to be sold; that the auctioneer took down that sum; and as soon as the estate was knocked down to the Plaintiff at 805*l.*, the Defendant publicly in the sale room objected; and informed the Plaintiff of the instructions he had given; and that the auctioneer must have been under some mistake in knocking it down at 805*l.*

The auctioneer by his depositions stated, that upon the 5th of *June* 1805, he, by order of the Defendant, put up the estate to sale by auction. About two hours before the sale the Defendant told the deponent, the premises should not be sold for less than 1000 guineas. The deponent replied, that the Defendant should appoint somebody to bid for him. The Defendant said, he should not appoint any body for he should be there himself. About an hour before the sale the Defendant told the deponent, that if 1000*l.* could be got for the premises, they should go; of which sum the deponent made a memorandum. The deponent procured a person to bid for the Defendant: but he again said, as he should be there himself, he should not want any one. At the sale the Defendant bid 800*l.*, and had full opportunity to make a further bidding: the deponent declaring, after the bidding of 805*l.* by the Plaintiff, that he should count ten; (according to the usual mode;) and if no one should bid higher in that interval, the Plaintiff would

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(1) See the note (2) to *Buckmaster* v. *Harrop*, *ante*, vol. VII. 311.

(2) See *Abeel* v. *Radcliff*, 13 Johns. Rep. 297. *Sherburne et al.* v. *Shaw*, 1 New Hamp. Rep. 157.

(3) See the *American* cases cited in the note (*a*) to *Pym* v. *Blackburn*, *ante*, vol. III. p. 38.

1806.

BLAGDEN v. BRADBEAR.

be declared the real purchaser; which the deponent did accordingly; and, no person having bid, knocked down the lot. As soon as it was knocked down the Defendant objected to the sale publicly in the sale-room; saying, the premises should not go for that money; that they were not to go for less than 1000*l.*; and he would not complete the sale. The deponent had no authority from the Defendant to sign any agreement: but it is customary for auctioneers to do so on the part of the person, for whom they are employed. Immediately after the sale the Plaintiff offered to pay the deposit; which the deponent refused to take; as he then had money in his hands of the Plaintiff's to a greater amount. The Plaintiff, after the sale, in the sale-room signed a note, indorsed on the conditions of sale. About a month or two after the sale the Plaintiff paid the deponent a deposit of 15*l. per cent.* and half the auction duty; amounting together to 134*l.* 8*s.* 4*d.*, for which the deponent gave a receipt.

Several other witnesses stated what passed at the sale to the same effect, that the Defendant immediately remonstrated; insisting, that it was no sale; that there was a mistake; and no advantage should be taken of it, &c.

Mr. Alexander, *and Mr. Leach*, *for the Plaintiff.*—In this case the principal question is, whether a sale by auction is within the Statute of Frauds. (*a*) This is a point of considerable importance; from the inconvenience, that must ensue, if a person, having circulated an undertaking, that his estate shall be put up to sale, and the highest bidder shall have it, can, when persons are collected for the purpose of bidding, and their money prepared, in the middle of the transaction, the auctioneer having proceeded to act under his authority, be permitted to retract, taking advantage of a defect of legal form. That point has never been decided. An authority, though always revocable at Law, is not so in Equity; if given upon valuable consideration; which has in many instances prevailed; where the consequence of giving way to it would amount to fraud. In *Simon* v. *Metivier* (*a*) the question was, whether the purchaser was bound; and it is said, the Court went upon the circumstance, that the auctioneer put down the name of the purchaser. How could it be contended, that the auctioneer is the agent of the purchaser? What confidence, what connection is there between them? But the auctioneer is clearly the agent of the vendor; and the utmost inconvenience must follow, if the vendor, having permitted the auctioneer to use his authority in the face of the world to the extent of completing the contract, can be justified in revoking it,

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(*a*) Stat. 29 *Ch.* 2. *c.* 3.
(*a*) p. 469 1 *Blacl.* 599. 3 *Bac.* 1921

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taking advantage of the circumstance, that the contract is not put in writing, merely on the ground that he had omitted to take measures by employing persons to bid, which upon the authorities (*b*) is legal, to prevent a sale under the price he had fixed. It is sufficient, that the agent is authorized by parol; and it is not necessary that all the terms of the agreement should be stated; if they can be ascertained; and the conditions of sale are admitted by the answer; and the sum is stated in effect; for it appears by the conditions of sale, that the deposit was to be 15*l. per cent.*; and the amount of the deposit is ascertained by the receipt. [470]

Mr. Richards, and Mr. Trollop, for the Defendant.—In this case there is no agreement in writing; which is absolutely necessary; and the Defendant declared off the moment the lot was knocked down. The subsequent signature by an agent, whose authority was revoked, cannot make good an agreement, originally bad for want of signature. The auctioneer ought to have adopted the proper mode of preventing a sale under the price fixed by the vendor; and should have directed him to employ persons for that purpose. In *Mortlock* v. *Buller* (*a*) neglect of duty by the trustee was held a sufficient defence in a suit for specific performance. The case of *Simon* v. *Metivier* (*b*) applies to chattels only. The attempt to apply the doctrine of that case to land has been frequently made; but always without effect. In *Buckmaster* v. *Harrop* (*c*) it was remarked by the Court, that the doctrine of that case does not extend to land: and its application even to chattels has been doubted. Here is no act, that can be considered the act of the party, or his agent. The authority of the auctioneer was revocable, and was clearly revoked.

The MASTER *of the* ROLLS.—In the case of *Coles* v. *Trecothick* (*d*) Lord *Eldon* noticing *Simon* v. *Metivier*, did not approve the distinction taken between goods and lands.

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[471] *July 26.*

The MASTER *of the* ROLLS.—In opposition to the specific performance, prayed by this bill, the Statute of Frauds (*a*) is insisted on. The Plaintiff endeavours to repel that defence by contending, in the alternative, either that the auctioneer's receipt is a sufficient agreement in writing; or, that an agreement in writing is not necessary, as the provisions of the Statute do not effect sales by auction. The pro-

(*b*) *Conolly* v. *Parsons*, *ante*, vol. iii 625. note (*a*). See *Smith* v. *Clarke*, *post*, 477. (*a*) *Ante*, vol. x. 292.
(*b*) p. 470. 1 *W. Black.* 599. 3 *Burr.* 1921.
(*c*) *Ante*, vol. vii. 341. *post.* (*d*) *Ante*, vol. ix. 234
(*a*) p. 471. Stat. 29 *Ch.* 2. *c.* 3.

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BRAGDEN v. BRADBEAR.

position, that the auctioneer's receipt may be a note or memorandum of an agreement within the Statute, is not denied; but for that purpose the receipt must contain in itself, or by reference to something else must show, what the agreement is. In this instance one very material particular, the price to be paid for this estate, does not appear upon the receipt; for the amount of the deposit, unless we know the proportion it bears to the price, does not show what the price is; and the receipt contains no reference to the conditions of sale, to entitle us to look at them for the terms. The Plaintiff says, the Defendant admits the terms, but according to the modern, and I think the correct doctrine, (*b*) it is immaterial what admissions are made by a Defendant, insisting upon the benefit of the Statute, which throws it upon the Plaintiff to show a complete written agreement, and it can no more be thrown upon the Defendant to supply defects in the agreement than to supply the want of an agreement.

As to the doctrine, that the Statute of Frauds does not apply to sales by auction, there is no decision; for though [472] in *Simon* v. *Metzier* (*c*) the Judges did express their opinion, the ground of their decision was, that the memorandum of the auctioneer answered the requisitions of the Statute. The words of the Statute are large enough to comprehend every contract, by whatsoever preliminary process, whether verbal communication, or bidding at or after, or however it has been brought about, which is not taken out of the mischief against which the Statute meant to guard. From the public nature of an auction it does not follow, that what passes there must be a matter of certainty: so far from that, that I never saw a more contradictory swearing than in cases where application has been made to introduce evidence of what was said or done during the course of the sale. Although often the terms and conditions are alluded to as supply by a written or printed particular, yet if it be true that the Statute does not effect any sales by auction, the whole of the terms might be left to parol evidence, at the hazard of all the uncertainty of perjury, which the Statute intended to exclude. I should therefore hesitate to say the policy of the Statute does not extend to such sales. Still more should I hesitate to say, the words of the Statute, according to the true construction, do not include sales by auction. In *The Attorney-General* v. *Day* (*a*) Lord *Hardwicke* takes occasion to state the grounds upon which sales of a particular description, *viz.* under a decree of the Court, are necessarily excepted. It seems Lord *Hardwicke* had no idea, that sales by auction, generally, are excepted; for the grounds upon which his

(*b*) See *Cooth* v. *Jackson*, *ante*, vol. vi. 12.
(*c*) 1 *W. Blacks.* 599. 3 *Burr.* 1921.
(*a*) 1 *Ves.* 218.

lordship states the exemption of judicial sales, are not applicable to other sales by auction. I am not warranted therefore to say, that an agreement in writing is not necessary in * this case; and I have already said, there is not a sufficient agreement in writing.

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The consequence is, that this bill must be dismissed; but without costs (a).

(a) *Mason v. Armitage, post.*

DOSWELL v. EARLE.

ROLLS. *July 2, 29.*

Legacy to a married woman, subject to a life interest, reduced into possession, as against her right, surviving, by payment to her husband during the life of the person entitled for life.

BENJAMIN NEVILL by his will, dated 7th *January*, 1776, gave to his daughter *Jemima Doswell*, the wife of *John Doswell*, 250*l.*; and to his daughter *Mary* 150*l.* The testator then directed his executors to retain the 250*l.* given to *Mary*, and 250*l.*, part of the legacy given to *Mary*; and to put out the same on securities, and pay the interest thereof to the testator's wife *Elizabeth*, for her life, and after her decease he gave the said moneys, so to be retained, to *Jemima* and *Mary* equally to be divided between them. He gave his son *Benjamin* a leasehold messuage, with the reversion, charged with an Annuity to his wife, upon condition, that in case either of his daughters or his son should not live, he, or they, should be lawfully entitled to such Legacy and Bequest as by him given and bequeathed, if they had survived, and without issue, then the share of her, or them, so dying, should go to the survivor or survivors of them, equally to be divided between them.

In the year 1795, *Ann Bradley* the executrix, was applied to by *John Doswell* to pay him the 250*l.*; which she accordingly did, with his wife's consent, on his undertaking to pay the testator's widow the annual interest for her life. He regularly paid the widow the interest, till he died, in 1797; and his executors continued to pay the interest till the death of the widow in 1805. On her death *Mrs. Doswell* filed the bill against the executors of her husband, and the executors of *Ann Bradley*, claiming the 250*l.*

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Mr. Richards, and Mr. Wainwright, for the Plaintiff, insisted, that the payment by *Ann Bradley* to *John Doswell* was an anticipated and unauthorized payment; amounting to a breach of trust; and the legacy could not be considered as reduced into possession, so that *Mrs. Doswell* was deprived of her right by surviving her husband.

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DOSWELL v. EARLE.

Mr. Treslove, for the Executors of John Dor[illegible] Toller, for the Executors of Ann Bradley.—There is no trust in the will for the separate use of *Jenny Doswell*, and therefore *Ann Bradley* was at liberty, if she thought proper, to pay the money to *John Doswell*, and was responsible only to the testator's widow. There is no doubt a husband may, for valuable consideration, dispose of, or bind, the property of the wife's *chose in action*: however doubtful it may be, whether he can defeat her Equity to have a provision out of it; where it is not reduced into possession. She claims by this bill the whole property, after it had been actually reduced into possession by her husband in his life. The wife consented to the payment at the time; and acquiesced in it nine years after her husband's death. Suppose an executor, who is not bound to pay a legacy till a year after the testator's death, thinks proper to pay it immediately; can the Court call back that payment?

[475] *The* MASTER *of the* ROLLS.—The question, how far the liability of the trustee extends, and how far the exercise of his discretion bars the wife, in a case where he could not have been compelled to pay to any person, is a question of extensive consequence, and deserving consideration.

July 29. *The* MASTER *of the* ROLLS dismissed the bill, without costs.

July 16.

DAVIS *v.* WEST.

Relief against forfeiture by breach of covenant by lessee; where compensation can be made. (1)

A MOTION was made for an injunction to restrain execution upon a verdict obtained in an action of ejectment, brought upon a breach of covenant by non-payment of rent.

Mr. Bell, in support of the Motion, cited *Wadman* v. *Calcraft*. (a)

The Solicitor-General, for the Defendant.

The Lord CHANCELLOR.—In this case I take it, that there are other covenants, under which, if breaches had ta-

(a) *Ante*, vol. x. 67.

(1) See the note to *Sanders* v. *Pope*, *ante*, p. 282.

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[* 476]

ben [illegible], and had been proceeded on, the Defendant might have recovered in ejectment; the answer stating, that there are breaches of other covenants; for instance, by permitting scutch grass to overgrow the premises, and by dilapidations of the buildings: but admitting, that the Defendant did not proceed upon the breaches of those covenants; went only upon the covenant for non-payment of rent; supposing that sufficient. In the late case of *Sanders* v. *Pope* (*a*) I was very unwilling to give the relief against breach of other covenants, but was compelled by a series of authorities, *Cage* v. *Russel*, (*b*) *Northcote* v. *Duke*, (*c*) *Huck* v. *Leonard*, (*d*) *Wafer* v. *Mocatto*, (*e*) *Eaton* v. *Lyon*: (*f*) establishing, that, where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a Court of Equity to interfere, and give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent; and the only distinction is, that in the latter case it is considered so clear, that the object of the clause for re-entry is only to secure the payment of the rent, that the Legislature interposed; and made it unnecessary to come into Equity; allowing the tenant upon the terms, and within the time, specified by the act, (*g*) to stop the ejectment; leaving the ancient jurisdiction of Equity in every other case untouched.

In this case, therefore, I shall put the landlord in the same situation as if the tenant had paid his rent; and then shall grant the injunction: but not to prevent another ejectment; if any other covenants have been broken.

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By consent, the amount of what was due for the arrears of rents, and costs, was ascertained by affidavit, instead of a reference.

(*a*) *Ante*, 282. (*b*) 2 *Vent.* 352 (*c*) *Amb.* 511.
(*d*) 9 *Mod.* 90. (*e*) 9 *Mod.* 117. (*f*) *Ante*, vol. iii. 690.
(*g*) Stat. 4 *Geo.* 2. *c.* 28.

1806.

July 7. 18.

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The circumstance, that a person bid at an auction under the private direction of the vendors, for the purpose of preventing a sale under a sum, specified as the value, is no objection to a specific performance; especially in a case, where the vendors were assignees under a Commission of Bankruptcy: and the purchaser was not present; but purchased by an agent.

Whether bidding at an auction on the part of the vendor, for the purpose of enhancing the price, vitiates the sale, and prevents a specific performance, *Query*. (1)

Evidence of a distinct, substantive, fact, without an allegation on the record, not received

THE object of the bill in this cause was the specific performance of a contract for the sale of an estate to the Defendant *John Clarke*, on behalf of his uncle, the other Defendant *George Clarke*. The Plaintiffs, as assignees under a Commission of Bankruptcy, put up the estate in question with other estates to sale by auction; and the Defendant was the purchaser of this lot, at the sum of 750*l*. The objection, as represented by the answer, was, that a person, named *Liddell*, was employed, and bid, as a setter or puffer, for the purpose of enhancing the price. The fact, that *Liddell* was employed by the Plaintiffs, and did bid, was distinctly proved. There was also evidence, that the auctioneer declared, that there were no in-bidders present: but, as the answer contained no allegation of that fact, the Plaintiffs objected, that it could not be received in evidence. The instructions to *Liddell*, were to bid up to, but not to exceed, the sum of 750*l*. upon the lot in question. The answer represented, that between the times, when the draft of the conveyance was sent, and when it was returned, the circumstance of *Liddell*'s bidding for the Plaintiffs was discovered. It appeared in evidence, that *Liddell* bid immediately before the bidding upon which the Defendant was the purchaser. *John Clarke*, when the sale was over, declared, that, if his uncle would not stand to it, he would. With the exception of the circumstances above stated, there was no imputation of fraud: nor was there any suggestion, that the sum of 750*l*. exceeded the value.

The MASTER *of the* ROLLS upon the objection to the evidence of the declaration by the auctioneer said, that as it was a distinct, substantive fact, it could not be received in evidence without an allegation upon the record.

Mr. Johnson, and Mr Wear, for the Plaintiffs.—The question whether a sale by auction is void by the bidding of a person employed by the vendors, with a view to enhance the price, must now be considered as settled. The Plaintiffs, bound as assignees, to sell the Bankrupt's estate for the most, that could be procured, having ascertained the value, took the usual means of preventing a sale under that amount; following the general, or rather the universal, practice. The decision of the Court of King's Bench against that practice in the case of *Howard* v. *Castle* (a)

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(a) 6 *Term Rep.* 642.

(1) See the note to *Bramley* v. *Alt*, *ante*, vol. iii, p. 620.

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was by the case of no real bidder: a case of mere fraud: but it has never been determined to be illegal, where there was competition; and the contrary proposition was clearly maintained in the case of *Bramley* v. *Alt.* (*b*) In the case, now before the Court, it appears, both by the answer and the evidence, that several persons bid; and there was not an allegation, much less any proof, of imposition, or that the sale was at more than the value. It cannot be supposed, that any person, attending a sale by auction in this country, can be ignorant, that some person is employed to bid for the vendor. [479]

Mr. Richards, and *Mr. Hart*, *for the Defendant*.—This case has particular circumstances, that did not occur in any of the cases that have been referred to: a puffer, of whom no person in the room had any notion, and a declaration by the auctioneer, that there was no puffer. Upon the general point much discussion has taken place; and a considerable difference of opinion has prevailed. The opinion of Lord *Mansfield* and Lord *Kenyon* was, that there ought to be no puffers; and that opinion is confirmed by reason, with reference to the effect upon a man going into the room, and seeing persons of knowledge and experience bidding, as he imagines, for themselves. This Defendant the moment he discovered the fraud retracted, having till that time supposed *Liddell* was a real bidder. The Plaintiffs ought to be left to an action.

Mr. Johnson, *in Reply*, observed, that all these cases must turn upon fraud; that the public must be supposed to be apprised of such a transaction; and if the assignees had not employed some person to take care that the property should not go under its value, they would have been charged as for wilful default; which case is put by Lord *Rosslyn* in *Conolly* v. *Parsons*. (*a*)

The MASTER *of the* ROLLS.—This bill, filed for the purpose of obtaining a specific performance of a contract for the sale of an estate to the Defendant, is resisted on the ground of fraud; which, as it is imputed by the answer, consists in this; that the Plaintiffs, the vendors, employed a person to bid for them at the auction. The evidence very clearly proves the fact, that *Liddell* was employed by the Plaintiffs, with instructions not to let the premises go under certain specified prices; for the lot in question 750*l*. For that purpose it was purchased by, or for, one of the Defendants. I take it upon the evidence, that the bidding, immediately preceding that of the agent for the Defendant, was [480]

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(*b*) *Ante*, vol. iii. 620. (*a*) *Ante*, vol. iii. 625, note (*a*).

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made by the bidder for the Plaintiffs. Though the [illegible] not distinctly so stated, yet I collect it from the general tenor of the evidence.

This is the state of the case, upon which the decision must proceed; as I cannot take any notice of the evidence, by which it is attempted to introduce a defence totally different from that made by the answers, alleging only, that a bidder was employed by the Plaintiffs without the knowlege of either of the Defendants. Such knowledge is not imputed, and evidence is not necessary to prove the want of it. The evidence goes to prove, not the mere absence of such knowledge, but, that positive information was given by the auctioneer, that there was no bidder on the part of the Plaintiffs. That is perfectly a different case; and there is not in the answers a syllable, leading to a supposition, that such a case existed.

The evidence, if it could be gone into, seems to be attended with considerable suspicion. It is extraordinary, that the defendants, at the time the answers were put in, should not have known any thing of this declaration by the auctioneer; especially as their own agent *Townshend* was one of the witnesses, who proved it. If they did know the
[481] fact, by suppressing it, a fraud appears to have been intended, or a surprize upon the Plaintiffs. Of seven witnesses for the Defendants, all present at the auction, three speak to this declaration by the auctioneer: three upon the same interrogatory are silent with regard to that fact. The seventh, who was the agent of the Defendant *George Clarke*, is not at all examined upon that interrogatory. He is not even asked, whether he knew, or did not know, that bidders were employed by the Plaintiffs. But that is not all; for the Defendant *John Clarke* was present at the auction, and by his answer he does not say a word of a declaration. Both he and *George Clarke* speak of a declaration of a similar import, but made at another time, and at a different auction: *viz.* a declaration by the auctioneer then, that, though there had been in-bidders at the former sale, there were none at that sale. Either some misrepresentation must have taken place with reference to this fact, as to the time of the declaration, or there must be some confusion upon it. It is sufficient, that I cannot take any notice of the evidence, as applicable to this case.

The question then is, whether, upon the statement I first made, the Plaintiffs have been guilty of such a fraud as precludes them from relief by a specific performance. My opinion upon that question is, that they neither intended, nor have they practised, any fraud. They are the assignees under a Commission of Bankruptcy. They appear to have set a value upon the estates, which were the property of the Bankrupt; and resolving to sell them by auction, they

employed a person to attend the sale, and to bid up to a price specified against each lot, as the very lowest price at which the premises ought to be sold, and, according to the statement of one of the witnesses, they directed that * person to be cautious not to go beyond the limits prescribed; as, if he should, and the lot should be knocked down to him, he must take it. Therefore they did not employ him for the purpose, generally, of enhancing the price, but merely to prevent a sale at an under-value, and they stated previously what they conceived to be the true value, below which the lot ought not to be sold.

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After the case of *Bramley* v. *Alt*, (a) and what Lord *Rosslyn* stated to be the strong and clear opinion in *Conolly* v. *Parsons*, (b) it would be too much for me to say, this is in itself a fraud, unless I could say, every direction by a vendor to any person to bid in his behalf is of itself such a fraud as to vitiate every agreement, that takes place at an auction; at which that direction is given. In *Bexwell* v. *Christie* (c) very general and broad principles are laid down by the Court of King's Bench; beyond my that the case immediately before the Court required. The subsequent case *Howard* v. *Castle* (d) proceeded upon the ground of plain and direct fraud: Lord *Kenyon* stating, that it appeared at the trial to be bottomed on fraud; that it was fraud from beginning to end. There was no real bidder: and there were several bidders for the vendors. Whenever I shall be able to state the same proposition of any case, I shall come to the same conclusion. But it is clear, Lord *Kenyon* had not always entertained the same opinion as to the doctrine in *Bexwell* v. *Christie*; for in *Twining* v. *Morrice* (e) he states, with respect to bidders being employed for the vendors, that he does not say, the doctrine in *Bexwell* v. *Christie* is wrong. But every body knows, that such persons are constantly employed. In *Bramley* v. *Alt* (a) Lord *Bramley* expresses his opinion, that it is perfectly legal for a man to state a price, below which he would not permit a sale; and his Lordship observes, that there is no difference between setting up the lot at a given price, and employing a person to prevent a sale under that price; if that is communicated.

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I do not mean to state a proposition so general, as that there can be no fraud through the medium of persons employed by the vendors. Lord *Rosslyn* appears in *Conolly* v. *Parsons* (b) to doubt, whether there can be that species of fraud, whether in any case the purchaser can be said

(a) *Ante*, vol. iii. 620.
(b) *Ante*, vol. iii. 625 note (a).
(c) *Cowp.* 395.
(d) 2 *Bro. C. C.* 226.
(e) 1 *Bos. & P.* 482.
(a) p. 483. *Ante*, vol. iii. 620.
(b) p. 483. *Ante*, vol. iii. 625 note (a).

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to be defrauded merely as being drawn in through eagerness of zeal of competition with others. I do not go that length; for if the person is employed, not for the defensive precaution, with a view to prevent a sale at an under-value, but to take advantage of the eagerness of bidders to screw up the price, I am not ready to say, that is such a transaction as can be justified in a Court of Equity. Neither do I say, that, if several bidders are employed by the vendor, in that case a Court of Equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It is not necessary for the defensive purpose of protection against a sale at an under-value. I leave those cases to be determined upon those grounds, whenever they may occur. It is sufficient to say, this is not a case of that description. These Plaintiffs had not a fraud in contemplation, and were not in a situation, that made it peculiarly incumbent upon them to take care not to permit a sale at an under-value.

[484] Under these circumstances, therefore, I cannot say these Plaintiffs have practised a fraud. If they had, it would be a great stretch to give this Defendant *George Clarke* the benefit of the principle; for he was not present at the sale. It was not therefore through competition that he was induced to give the price: but a person, who was present, bid under the impression, that he would adopt the bidding. He was perfectly at liberty to adopt it, or not. It would be strong to say, he was drawn in through eagerness and zeal of competition to give more than otherwise he would have given; as it was submitted to his judgment; and he adopts the bidding out of doors. If the person, who purchased, had a fraud practised upon him, I do not say, he might not avail himself of it: but I should require a strong case of fraud against the original purchaser to induce me to give the benefit of it to his assignee.

Therefore decree a specific performance against *George Clarke*. As to *John Clarke*, he was only an agent. The bill as against him must be dismissed

1806.

ROLLS.
June 19.
July 18.

FRANKS *v.* NOBLE.

Interest by will, in the nature of Annuity, not apportioned in favour of the executor of the tenant for life.

MOSES HART by his will, dated the 2d of *April* 1756, after giving several Annuities, the first payment to commence from the first quarter day after his decease, gave, devised, and bequeathed, all his *Exchequer* Orders and Annuities, and all his jewels, household furniture, &c. and other personal estate and effects, and pictures, (except his books, plate, china, and linen,) and all his messuages, lands, tenements, and premises at *Isleworth*, *Richmond*, and *Topsfield*, and also all his leasehold estates, and all other his real and personal estate of what nature or kind soever, or wheresoever, not otherwise disposed of, which the testator then was, or at the time of his decease should be possessed of, interested in, or entitled to, in possession, reversion, expectancy, or remainder, to trustees, their heirs, &c. upon trust, with all convenient speed to sell his estates at *Isleworth*, freehold and copyhold, and all the lands he held of the crown at *Richmond*, and all his jewels, pictures, and household furniture, &c. and other personal estate, not specifically bequeathed; and to place out the money, arising from the sale, in Government securities; and out of the yearly income and produce of his said *Exchequer* Orders and Annuities, and also out of the rents and profits of his said estate at *Topsfield* and of his leasehold estates, and of all other his real and personal estates, to pay the Annuities therein-before given and bequeathed, and after payment thereof, that they should pay the surplus of the yearly income and produce of his said real and personal estates in manner following: one moiety thereof unto his daughter *Judith Levy* for and during the term of her natural life, or so long as she should continue the widow of *Isaac Levy*, her late husband, by equal half-yearly payments, the first payment to be made on the second quarter day, which should happen next after his decease, and the other moiety thereof unto his daughter *Rachael*, the wife of *Moses Delphus*, for and during the term of her natural life, for her sole and separate use, the same to be paid her by half-yearly payments, the first payment to be made on the second quarter day which should happen next after his decease.

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The testator then declared a further trust; that, if *Rachael Delphus* should survive *Judith Levy*, or if *Judith Levy* should marry again, from the time of such death or marriage the moiety of the surplus of the income of the said real and personal estates, made payable, as aforesaid, to *Judith Levy*, should be paid by half-yearly payments to *Rachael Delphus*, for the term of her natural life, for her sole and separate use, in the same manner as the other moi-

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FRANKS v. NOBLE.

ety was directed to be paid to her; and, if *Rachael Adolphus* should die without leaving any issue of her body, and *Judith Levy* should survive her, that in such case the moiety of the surplus of the income, &c. made payable to *Rachel Adolphus*, as aforesaid, should by half-yearly payments be paid to *Judith Levy* during her life, if she should so long continue the widow of *Elias Levy*; and, if *Rachael Adolphus* should at her death have any issue of her body lawfully begotten, that then and in such case the moiety, &c. payable to *Rachael Adolphus*, as aforesaid, should from thenceforth by half-yearly payments be paid to all the children of *Rachael Adolphus* during their respective lives in equal proportions, share and share alike, with benefit of survivorship, in case any of them should die; and upon further trust, that from and after the death and marriage of *Judith Levy* the income of his said real and personal estates, devised to her, as aforesaid, should be paid by half-yearly payments to and amongst all and every the children of *Rachael Adolphus* in the same manner, and with the like benefit of survivorship.

The testator then gave directions to his trustees, in case *Rachael Adolphus* should leave any issue, for their maintenance and education out of the yearly income and produce of his said real and personal estates, devised to them, as aforesaid, until they should respectively attain the age of 25; and declared a further trust from and after the decease of both his said daughters, and of the issue of *Rachael Adolphus*, or on the marriage of *Judith Levy*, as aforesaid, (she surviving *Rachael Adolphus* and her issue,) that the trustees, &c. should pay the yearly income, interest, and produce, of all his said estates unto and amongst so many of his sisters *Margales Simons*, *Judith Hart*, and *Jacobed Hart*, as should be then living, and to the survivors and survivor of them, share and share alike, for and during their respective natural lives and the life of the longer liver of them by equal half-yearly payments, for their sole and separate use and benefit; and upon further trust from and after the decease of his said daughters, and of the issue of *Rachael Adolphus*, and of his said three sisters, that his trustees should pay the yearly income and produce of his said real and personal estate unto *Moses Hart* and *Napthali Hart*, the sons of his brother-in-law *Solomon Hart*, for their lives, share and share alike, and, in case either of them should after the deaths of the said *Judith Levy* and *Rachael Adolphus*, and of the children of *Rachael Adolphus*, if she should have any, and of his three sisters, depart this life without having issue male of his body lawfully begotten, then in trust to pay the whole yearly income and produce of his said real and personal estate unto the survivor of them for his life.

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The testator further directed, that, if *Moses Hart* should after the deaths of *Judith Levy* and *Rachael Adolphus*, and the children of *Rachael Adolphus*, if she should have any, and of his said three sisters, depart this life before *Napthali Hart*, leaving issue male of his body, that then his trustees, or the survivor, &c. should convey one moiety of his said real estate at *Topsfield*, and also convey one moiety of all such other parts of his freehold and copyhold estates, as should be then remaining unsold, to trustees, to the use of the first and every other son or sons of *Moses Hart*, successively in tail male; with remainders to *Napthali Hart* for life, and to his first and other sons in the same manner; and, in default of such issue, to the testator's right heirs, with a direction in the same event to lay out one moiety of the testator's personal estate, and of money produced by the sale of his freehold and copyhold estates, in lands of inheritance, to be conveyed and settled to the same uses. A similar direction was given in the event of *Napthali Hart* dying before *Moses Hart*, and leaving issue male, and in case *Moses* and *Napthali Hart* should both die without leaving any issue male, or such issue male should die without leaving any issue male, then the trustees should convey the estate at *Topsfield* and all other his freehold and copyhold estates remaining unsold to such person who should at the death of the survivor of *Moses* and *Napthali Hart* be the testator's right heir; and should dispose of all his personal estate according to the Statute of Distributions; *(a)* and he declared his will to be, that, as often as any of the parties, to whom he had given and bequeathed any Annuity by his said will, or otherwise, should depart this life, all such sum and sums of money, as should or might be set apart to answer the payment of such Annuity or Annuities, should from the decease of such Annuitants or Annuitant go and be accounted as part of his estate, and be appropriated to such purposes as he before directed the surplus of his estate to be appropriated; and he appointed his trustees to be his executors. [488]

The testator died upon the 19th of *November* 1756. On the 16th of *February* 1758 by a decree, made upon the bill of *Judith Levy*, directions were given for taking an account of the personal estate, &c.; and for payment of the Annuities; and, that the executors should appropriate a sufficient part of the personal estate for payment thereof; and it was declared, that the several funds, which should be set apart to answer the Annuities, would upon the deaths of the Annuitants constitute part of the general residue of the personal estate; and it was ordered, that the residue should be continued or placed out in Government securities upon the trusts of the will; that an account should be taken of the in- [489]

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FRANKS v. NOBLE.

terest and produce of the personal estate, accrued due since the testator's decease; and that the clear produce of such personal estate, that had accrued and should accrue due after payment of the legacies, should be divided into moieties; and that one moiety should be paid to *Judith Levy* during her life or widowhood; and the other moiety to the Defendant *Rachael Adolphus* during her life, for her separate use; and the first payment of such interest and produce was to be made on *Lady-day*, Old Style, pursuant to the will; and to be continued to be paid from that time half-yearly at *Michaelmas* and *Lady-day*, Old Style.

Under that decree the income of the clear residue of the personal estate, and the rents and profits of the freehold, copyhold, and leasehold estates were paid to *Judith Levy* and *Rachael Adolphus* in moieties, by such half-yearly payments, during their lives. *Rachael Adolphus* died on the 22d of *November* 1773, without leaving any issue. The three sisters of the testator, and all the persons entitled to Annuities under the will, died in the life of *Judith Levy*. *Moses Hart* also died in her life, without leaving issue. *Judith Levy*, having continued a widow, died on the 19th of *January* 1803.

The bill was filed by the niece of *Judith Levy*, being her sole next of kin and administratrix, against the executor of
490] *Michael Adolphus*, the surviving executor of the testator *Moses Hart*, the elder, and against *Napthali Hart*; praying a declaration, that, in the events that happened, *Judith Levy* became entitled to all the income of the testator's estates, which accrued due before her death; and that the executor may be decreed to pay the balance accordingly.

The Defendant, *Napthali Hart*, by his answer submitted, that in the events, that happened, he is, according to the true construction of the will, entitled to the balance in the hands of the executor.

Mr. Hollist, and Mr. Gregg, for the Plaintiff, contended, that upon the true construction of this will *Judith Levy* was entitled to all the income up to the last day of accruing payment, previous to her death, according to the different natures of the property: *viz.* the dividends due upon the 5th of *January* 1803, and the rents due at *Christmas* 1802. They observed, in commenting upon the will, that the words "by equal half-yearly payments" are dropt in the subsequent part; under which the Defendant *Napthali Hart* claims; concluding therefore, that the purpose of half-yearly payments was dropt; and no part of the income, accrued due in the life of *Judith Levy*, was given over, in the event, to the Defendant *Napthali Hart*.

Mr. Fonblanque, and Mr. Hart, for the Defendant Napthali Hart, relied upon the restriction in the disposition to *Judith Levy*; prescribing half-yearly payments; the first

payment to be made on the second quarter day after the testator's death; *viz. Lady-day* 1757. They contended, that the subject of this disposition, though not in terms, was in the nature of Annuity; and therefore could not be apportioned; as dividends may be, and are by statute. (*a*) They insisted therefore, that *Judith Levy* was entitled only up to the day of the half-yearly payment, previous to her death: the period ascertained by the decree in the former cause, with reference to the particular direction of the will for half-yearly payments, commencing on the second quarter day after the testator's death. 1806. FRANKS v. NOBLE. [491]

The MASTER *of the* ROLLS.—This is a mixed disposition of property and Annuity, with very peculiar directions. The question is, which it partakes of most, and it seems to me to partake most of the nature of Annuity. I wish to look at the will, before I finally decide what *Mrs. Levy*'s interest was: but that is the inclination of my mind at present.

The MASTER *of the* ROLLS.—I stated my impression as to the merits, that there can be no apportionment in this case any more than in the case of an Annuity. I only postponed the judgment for the purpose of looking at the will more attentively; to see, whether it contained any expression, that might vary the opinion I formed upon the statement of those words, and I have not found, that the will contains any thing, that can have that effect. *July* 18

The decree was pronounced accordingly.

(*a*) Stat. 11 *Geo.* 2. c. 19.

1806.

July 23

WHITFIELD v. HALES.

Order for a guardian and maintenance for infants upon ill-treatment by their father.

A PETITION was presented on behalf of infants, for a reference to the Master to appoint a proper person to be their guardian, and a proper allowance for maintenance. The father of the infants, who was Plaintiff in the cause, was in possession of the estate. The petition was supported by affidavits of gross ill-treatment and cruelty towards the infants by their father; on which account a prosecution had been instituted, under which he was imprisoned. Notice of this application had been given, and no one appeared to oppose it.

Mr. Bell, in support of the Petition, said there were several authorities for the interference of the Court in such a case; suggesting, that the father was practising for the purpose of keeping possession of the estate.

The Lord CHANCELLOR made the order, referring to Lord *Eldon's* opinion in *De Manneville's* case, (*a*) that under such circumstances the Court will interfere.

(*a*) *De Manneville* v. *De Manneville*, *ante*, vol. x. 52, [and references.]

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July 24.

WITTS v. CAMPBELL.

Co-plaintiff, as next friend, struck out, his evidence being necessary, but, as a general rule, upon giving security for the costs incurred.

A MOTION was made on behalf of a Plaintiff, that the name of a Co-plaintiff, as the next friend, may be struck out, and another person substituted as the next friend; on the ground, that the evidence of the next friend was necessary; and the Plaintiff, being answerable for the costs, cannot give evidence for a Co-plaintiff.

Mr. Cullen, for the Defendant, insisted, that the next friend retiring must give security for the costs incurred.

The Solicitor-General, in support of the Motion, expressed doubt, whether that was the practice, as a general rule.

The Register (*Mr. Crofts*) stated, that the general rule is, that security shall be given.

The Lord CHANCELLOR said, that ought to be the general rule; and made the order accordingly, upon the terms that the next friend should give security for the costs incurred in his time.

1806.

HUGHES v. WILLIAMS.

v. 23 25

EXCEPTIONS were taken by the Defendant, a mortgagor, to the Master's report: in , that the Master had charged the Plaintiff, a mortgage sion personally, and by a receiver under his appointment, with the rents actually received: whereas he ought to have been charged according to the circumstance evidence with the improved rents, at which the estates had been since let by the receiver appointed by the Court, and which ought to have been obtained by the Plaintiff or the receiver, but for their wilful neglect or default.

Another exception was, that the Master had allowed the Plaintiff the sum of 68*l.* for the expense of opening a slate quarry: the Defendant contending, that it was an illegal and improper act, and the only benefit accruing to the estate thereby, being the sum of 2*l.*, charged to the Plaintiff's account, as the produce of the Lites

The Defendant was out of possession long before the Plaintiff entered [illegible] prior mortgagees having been in possession; whom he paid, to prevent foreclosure.

The Solicitor-G[illegible] and Mr. Th[illegible] in support of the Exceptions.—Mr. Ka[illegible] Hart, for the Report.

Mortgagee in possession, though answerable, beyond fraud, for wilful default, is to take the fair rents and profits not bound to engage in, and will not be allowed for speculation and adventure

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The Lord CHANCELLOR.—I do not mean to say, that, to charge a mortgagee in possession, actual fraud is necessary It is sufficient, if there is gross, obvious, and gross, negligence, by not making use of facts within his knowledge: so as to give the mortgagor the full benefit, that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was underset, takes a new tenant, another person offering more: an offer however not to be accepted rashly. But this case does not furnish even that ground, for, with the exception of a proposition to give 7*l.* a year for one tenement, instead of 5*l.* a-year, the rent then paid, there is no proof of any proposal for an increase. A reason also is assigned for not accepting the proposal in that instance; that the tenant was in arrear: and the Plaintiff was apprehensive of losing that arrear; and there is more difficulty, where the estate consists of a number of distinct tenements.

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Another circumstance that weighs with me, is, that the mortgagor, if he knows the estate is underlet, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of im-

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provement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice, was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated, that the estate was not managed as it might be. Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to the principle that has been stated by the *Solicitor-General*, that it would be dangerous to say, the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shown as comes up to the description of wilful default, he ought to be answerable for it.

But I determine this exception upon the principle, that a [496] mortgagee, taking possession, is to take the fair rents and profits; and is not bound to engage in adventures and speculations for the benefit of the mortgagor; but is liable only for wilful default: of which in this instance there is no pretence: this mortgagor not having even communicated that he had any contemplation of improvement, or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more; which was never communicated.

Upon the same principle, on which I determine the first exception in favour of the mortgagee, I must determine the other exception against him. The principle is the safety of mortgagees. The line cannot be drawn. How can it be ascertained, that the mortgagor will want a slate quarry? The amount is in this instance inconsiderable: but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must speculate at his own hazard.

The first exception was over-ruled; and the other allowed

1806.

Ex parte HIGGINSON.

July 25.

Order in Bankruptcy to the Commissioners to take the surrender, under circumstances, that prevented it in time.

THE time for the surrender of a Bankrupt being elapsed, this petition was presented, praying an order to the Commissioners to take the surrender.

The Lord CHANCELLOR asked, whether there were instances of such an order; observing, that in the late case of *Johnson*, who was employed upon a most * important public service, though the order was made, a pardon was afterwards granted upon doubts as to the jurisdiction. [* 497]

Mr. Owen, in support of the Petition, said, there had been instances by Lord *Eldon*, and the case (*a*) of a young man, who had enlisted, and gone with the regiment to Gibraltar, was mentioned. The circumstances of this case, upon the affidavits, were, that the Bankrupt went abroad for the purpose of recovering a debt due to his estate; and took his passage upon his return in the only ship bound for *England*, which did not arrive in time.

The Lord CHANCELLOR said, that was quite sufficient, and made the order.

(*a*) *Ex parte* [illegible] 1 Ves. & B. [illegible].

BAKER *v.* HALL.

Rolls.

July 29.

Trust of an Annuity for a Charity, charged upon a devised estate, being void under the act, 9 *Geo.* 2. c. 36 does not pass by a residuary disposition, but sinks for the benefit of the specific devisees.

GREGORY WRIGHT by his will, dated the 8th of *July* 1787, executed and attested, so as to pass real estates, (amongst other things,) gave and bequeathed unto the Minister or Clergyman, for the time being, of the Parish Church of *Saint John's*, *Torrington*, in the County of *Norfolk*, for ever, one Annuity or yearly rent-charge, of 30*l.*, to be issuing and payable out of the mansion-house, messuage, or tenement, &c. called *Merton-hall*, upon trust to pay and apply the said yearly sum of 30*l.* for ever, from time to time, for the purpose of instructing as many poor boys of the said * Parish of *Saint John's*, *Torrington*, not otherwise provided for, in reading, writing, and arithmetic,

Possession by husband, as executor, not trustee, not a reduction into possession of his wife's share of the residue, entitling him against her right by surviving. (1)

[* 498]

(1) See the note (1) to *Bagot* v. *Bagot*, *ante*, vol. [illegible] p. 515; and *Ex parte* [illegible], 2 Deac. Chan. Rep. 155.

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until their respective ages of 13 years, with power of distress in case of non-payment of such Annuity, or any part thereof. The said testator also gave to *John Butts* and *George Hall*, and the survivor of them, his heirs, executors, and administrators, his said mansion-house, &c. with the appurtenances, (subject to the said Annuity or yearly rent charge,) upon trust, to receive the rents and profits thereof, and pay the same unto *Harry Wright* for his natural life; and after his decease the testator devised the said mansion-house, &c. (subject to the said Annuity of 35*l.*) to the said *John Butts* and *George Hall*, and to the survivor of them, his heirs, executors, and administrators, upon trust to receive the rents and profits thereof, and apply the same, or a sufficient part thereof, for the maintenance, &c. of *Stephen Parlett* and *William Parlett*, sons of his nephew *John Parlett*, until their respective ages of 24 years; and, when they should have attained their respective ages of 24 years, then the testator devised and bequeathed his said mansion-house, &c. with their appurtenances, (subject for ever to the said Annuity or rent-charge of 35*l.*) together with all such sum or sums of money as should have come into the hands of his said trustees for the rents and profits thereof, and not by them laid out for and towards the maintenance, &c. of the said *Stephen Parlett* and *William Parlett*, unto them the said *Stephen Parlett* and *William Parlett*, their heirs, executors, and administrators, as tenants in common, and not as joint tenants; and, after giving several pecuniary legacies, and devising some other estates specifically, the testator gave, devised, and bequeathed, all the rest, residue, and remainder, of his freehold, copyhold, and leasehold, estates, and all other his real and personal estates and effects, not by him therein before disposed of, to the said *John Butts* and *George Hall* and to the survivor of them, his heirs, executors, and administrators, upon trust, to sell the same; and after payment of his debts, legacies, and funeral expenses, &c. to pay and apply all the residue of the money to arise, by such sale, unto and equally amongst the petitioners in the cause: and he appointed the said *John Butts* and *George Hall* executors.

[499]

George Hall alone proved the will; and entered upon and took possession of, the real and personal estates of the testator; and afterwards disposed of part thereof. *George Hall* maried *Elizabeth Baker*, one of the residuary devisees under the will; and he died, leaving her surviving him.—She afterwards died, leaving an infant daughter, one of the Defendants in the cause.

The principal questions were:

1st, Whether the Annuity of 35*l.*, given to the trustees for the benefit of the Charity the trusts being void by the

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Statute, (a) went to the residuary devisees under the will, or to the specific devisees of the premises, on which it was charged.

2dly, Whether *George Hall*, by entering into possession of the real and personal estate of the testator as only acting executor and trustee under the will, and disposing of part, had sufficiently reduced into possession his wife's share, so as to give him an absolute title, transmissible to his personal representatives.

(b) *Mr. Richards, Mr. Leblanque, Mr. Knapp and Mr. Kenrick, for the Plaintiffs, and Defendants in the same interest,* contended, on the first point, that the trusts of the Annuity for the benefit of the Charity, being void by the Statute, the Annuity went to the residuary devisees, and not to the specific devisees (the *Parletts*,) making a distinction between a bequest of an Annuity to a Charity, in the first instance, which was void, and the bequest of an Annuity to a trustee for a Charity, so as to vest the legal interest in the Annuity in the trustee; consequently, though the trusts are void, yet the Annuity is still subsisting in the trustees, and goes as part of the estate not specifically disposed of, to the residuary devisees. [500]

On the second point, it was argued, that *George Hall* the husband, having absolutely entered into possession of the real and personal estate of the testators, and disposed of part, had sufficiently reduced into possession his wife's share of the residue to give him the absolute title.

Mr. Alexander and Mr. Hollist, for the Representatives of Stephen and William Parlett, on the first point insisted, that the trusts of the Annuity for the benefit of the Charity being void by the Statute, the Annuity sunk for the benefit of the specific devisees, (the *Parletts*,) and cited *Paxton* v. *Hurlock*. (a)

The MASTER *of the* ROLLS held, as to the first point, that the testator appeared to have expressly excepted the Annuity out of the residue of his estate; and could never have it in contemplation, that it should in any case go to the residuary devisees: and decided, that it should sink for the benefit of the specific devisees, (the *Parletts*,) as part of the produce of the premises devised to them. [501]

As to the second point, *the Master of the Rolls* said, the husband must be considered to have entered into possession of the real and personal estate of the testator, as trustee and executor of the will only, and not as husband; and

(a) Stat. 9 Geo. 2, c. 36.

(b) Examinations.

(a) p. 500 *Amb.* 487. *Greenwood* v. *Hunn*, *Amb.* 643. *Burdett* v. *Rose*, 1 *Bro. C. C.* 61. *Barrington* v. *Horneck*, 1 *Bro. C. C.* 61.

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therefore his wife's share of the residue could not be deemed sufficiently reduced into possession; so as to prevent it surviving to her upon his decease, and of course going upon her death to her representatives.

WITTS v. DAWKINS. (1)

ROLLS
April 24
July 29.

Trust by marriage settlement to pay the rents and profits according to the appointment of the wife, from time to time, in default of appointment to her for her sole and separate use, the receipts of herself, or the person she should appoint, from time to time, to be from time to time effectual releases, &c. Sale by her and her husband of her separate interest established.

BY indentures of settlement, previous to the marriage of the Plaintiffs *Edward Witts* and *Agnes Travell*, it was witnessed, that in consideration of the marriage, and other considerations, *Edward Witts* conveyed certain premises to trustees, and their heirs, to the use of *Edward Witts*, and his heirs, until the marriage; and after the marriage, to the use of trustees, and their heirs, during the joint lives of the Plaintiffs, upon trust, that they and the survivor of them, and his heirs, should pay, apply, and dispose of, all the rents, issues, and profits, of said hereditaments and premises, to such person or persons only, and for such intents and purposes only, as *Agnes Witts* should, by any writing or writings, to be signed with her hand, from time to time, notwithstanding her coverture, direct or appoint; and in default of such direction and appointment, and in the mean time, and from time to * time, until she should make any such appointment, should pay all said rents, issues, and profits, or so much, whereof she should or might, from time to time, happen to make no appointment, into her proper hands, for her sole and separate use and benefit, exclusive of her then intended husband, who was not to intermeddle therewith: nor was the same to be subject to his control, debts, or engagements; and that the receipts and discharges of the said *Agnes*, and of such persons as she should from time to time direct or appoint to receive all or any part of the said rents, issues, or profits, should from time to time be good and effectual releases and discharges of such sums of money as in such receipts and discharges shall be expressed to be received.

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The marriage took place; and the bill was filed by *Witts* and his wife; stating that the Plaintiff *Agnes Witts*, being by the trusts of the settlement entitled to the rents and profits of the settled estates during the joint lives of herself and her husband, to her sole use, with a power of appointment thereof as aforesaid, did about the 2d of *August*, 1804,

(1) Cited. and remarked upon, 3 Johns. Cha. Rep. 111, and 3 Desaus. Cha. Rep. 443.

with the approbation of the trustees, contract with *Henry Dawkins* for the sale to him of the said separate estate and interest in said premises, during the joint lives of herself and her said husband for 780*l.* 1806. WITTS v. DAWKINS.

The bill prayed a specific performance of the contract for the purchase of *Agnes Witts's* parate estate and interest in the premises during the joint lives of the Plaintiffs, by the Defendant *Dawkins*, and that he may also be compelled, upon having a proper appointment and conveyance of said estate and interest executed to him by Plaintiffs, and all other necessary parties. *Edward Witts* offering to join with his wife in making a good title, by fine, or otherwise, [503] to pay to the Plaintiff *Agnes Witts*, or such person as she should appoint the said purchase money, with interest at 5 *per cent.* from the time at which *Dawkins* took possession.

Mr. Richards and Mr. Horne, for the Plaintiffs, relied upon the cases of *Pybus* v. *Smith*, (*a*) *Ellis* v. *Atkinson*, (*b*) and the other authorities upon the principle, that a married woman is to be considered as a *feme sole*, with regard to her separate estate; the last of which is *Wagstaff* v. *Smith*, (*c*) distinguishing the cases of *Sockett* v. *Wray* (*d*) and *Newman* v. *Cartony*, (*e*) the power not extending to an appointment by deed, and *Whistler* v. *Newman*, (*f*) and *Mores* v *Huish*, (*g*) as having no power of appointment; admitting, in the two latter cases, Lord *Rosslyn's* opinion, that this doctrine should undergo revision

Mr. Raithby, for the Defendant, the Purchaser, did not object to complete the purchase, if the title was good.

The MASTER *of the* ROLLS expressed his opinion, that the latter cases did not interfere with *Pybus* v. *Smith*; and were not so intended, turning upon their own circumstances, not upon the construction of the words "from time to time"

The MASTER *of the* ROLLS made the decree according to the prayer of the bill. [504] *July* 29.

(*a*) 3 *Bro. C. C.* 340 *ante*, vol. i. 189.
(*b*) 3 *Bro. C. C.* 346 *n.* 565
(*c*) *Ante*, vol. ix. 520. See *Parkes* v. *White*, *ante*, vol. xi. 209
(*d*) 4 *Bro. C. C.* 483.
(*e*) 3 *Bro. C. C.* 346. *n.* 568.
(*f*) *Ante*, vol. iv 129.
(*g*) *Ante*, vol. v. 692.

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ROLLS.
May 22.
July 30

WEATHERALL *v.* GEERING.

Proviso against assignment without license in a lease to the Lessee, his executors, administrators, and assigns, not repugnant, the construction being such assigns as he may lawfully have, *viz.* by license, or by law, as assignees in Bankruptcy

Though Bankruptcy supersedes an agreement not to assign without license, that has been held only in favour of general creditors; and where there is no actual lease, but it rests in agreement to grant a lease, an individual cannot have a specific performance in opposition to such provision, and it is very disputable, whether the general assignees could obtain it, even if there was no such provision.

BY articles of agreement, dated the 30th of *June* 1796, reciting a lease, dated the 23d of *February* 1792, by *Thomas Atkinson* to *John Whettam*, his executors, administrators or assigns, of a farm, to hold to *Whettam*, his executors, administrators, and assigns, from *Michaelmas* last, for the term of 12 years, at the rent of 140*l.* a-year; and that by another lease, dated the 27th of *September* 1794, *Atkinson* demised to *Whettam*, his executors, administrators, and assigns, other premises to hold to *Whettam*, his executors, administrators, and assigns, from *Michaelmas* next, for the term of 9 years, at the rent of 15*l.* a-year; and, that *Robert Willan*, *Edward Knapp*, and *Henry Harley*, trustees under the will of *Atkinson*, had agreed to grant to *Thomas Whitear*, a lease of the before-mentioned premises, demised by the said indentures for the terms aforesaid, when and so soon as the same are expired, in manner and on the conditions herein after mentioned; it was witnessed, that *Willan*, *Knapp*, and *Harley*, did thereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, covenant, &c. with *Whitear*, his executors, administrators, and assigns, that they, *Willan*, *Knapp*, and *Harley*, their heirs and assigns, would execute and deliver unto **Whitear*, his executors, administrators, and assigns, on or before the 1st of *October* next after the expiration of the two recited leases, which would be in the year 1803, a lease of all the premises, comprised in both those leases, to hold to *Whitear*, his executors, administrators, and assigns, from the 29th of *September* 1803, for the term of nine years and six months, if *Thomas* and *Sarah Atkinson*, or either of them, shall so long live, at the yearly rent of 155*l.*, payable half yearly, and under, and subject, and liable to the same covenants, provisoes, and agreements, as in the said two recited indentures of lease are particularly set forth; and *Whitear* for himself, his executors, administrators, and assigns, covenanted with *Willan*, *Knapp* and *Harley*, and the survivor, and the heirs, executors, and administrators, of such survivor, that *Whitear*, his executors, administrators, or assigns, would accept the lease, &c.; in which said indenture of lease should be contained all such covenants, agreements, and provisions, as are contained in the said two recited indentures of lease to *Whettam*.

In 1800 *Whitear*, being indebted to *Thomas Weatherall*, agreed to assign to him the benefit of the said articles of agreement, by way of mortgage, and subject to redemption on payment of 507*l.* 10*s.* with interest; and accordingly *Whitear* delivered the articles to *Weatherall*, and by a deed-poll, dated the 10th of *January* 1800, assigned to *Weather-*

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all, his executors, administrators, and assigns, as well the said articles, as also all the estate, right, title, interest, benefit, and advantage, whatsoever, of *Whitear* of, in, and to, the same; with a proviso, that if *Whitear*, his heirs, executors, administrators, or assigns, should pay *Weatherall* 507*l.* 10*s.* with interest, upon the 6th of *July* next, the said deed should be void.

Whitear afterwards took the benefit of an Insolvent Act; [506] under which his estate was assigned to *Richard Geering* for the benefit of the creditors. *Thomas* and *Sarah Atkinson* being still living, and the original leases having expired in 1803, the bill was filed by *Weatherall*, praying an account of what was due to him for principal and interest under the deed of the 6th of *January* 1800; and that in default of payment the Plaintiff may be declared entitled to all such benefit of the said articles of agreement as *Whitear* was entitled to at the time he executed the deed of the 6th of *January* 1800; and that a lease may be executed accordingly.

The Defendants *Willan* and *Harley*, *Knapp* being dead, by their answer stated, that the indenture of the 23d of *February* 1792, contained the following proviso: "That if "the said *John Whettam*, his executors or administrators, "shall or do at any time during this demise, let, set, assign, "dispose of, or part with, this present indenture of lease, "or the said messuages, lands, and hereditaments demised, "or any part thereof, for the whole, or any part of the said "term hereby demised to any person or persons whomsoever, without the license and consent of the said *Thomas* "*Atkinson*, his heirs or assigns, in writing under his or their "hand or hands for that purpose first had and obtained then "and from thenceforth, and in either of the said cases, this "present indenture of lease, and the term and estate there-"by granted, shall cease, determine, and be void; and "thereon it shall and may be lawful to and for the said "*Thomas Atkinson*, his heirs or assigns, into and upon the "said demised premises, or any part thereof, in the name of "the whole, wholly to re-enter, and the same, and every part "thereof, to have again, re-possess, and enjoy, as in his or "their first and former estate and estates: this indenture, "or any thing herein contained to the contrary thereof in [507] "any wise notwithstanding; and that he the said *John* "*Whettam*, his executors, or administrators, shall not, nor "will at any time during the said term hereby granted, let, "set, sell, assign, dispose of, or part with, this indenture of "lease, or the premises hereby demised, or any part there-"of, for the whole, or any part of the term hereby demised, to "any person or persons whomsoever, without the license "and consent of the said *Thomas Atkinson*, his heirs or as-

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"signs under his or their hands in writing first had and ob-" "tained for that purpose."

The answer also stated a similar proviso in the lease of the 27th of *September* 1794; and submitted, that the Defendants are not compellable to grant any such lease: *Whitear* being, and having acknowledged himself to be, wholly incapable of fulfilling the said agreement on his part; and, in all events, they are not compellable to grant any such lease to the Plaintiff.

Mr. Richards, and Mr. Johnson, for the Plaintiff.—This is an express undertaking to demise to a man, his executors, administrators, and assigns. The lessee therefore, supposing the lease made, is entitled to assign by the terms of the contract: but upon the subsequent passage, providing, that the lease must be subject to the same covenants, provisoes, and agreements, in the two subsisting indentures of lease, it is contended that the agreement must be considered, as if the proviso against assignment without license was inserted in the agreement. The question is, upon the construction of the proviso, whether the Defendants have a right to refuse. When a party takes a lease to him, his executors, administrators, and assigns, he takes an interest, expressly, that he [508] may assign; as a man, having an estate to him, his heirs and assigns, has the whole dominion; and a covenant, tending to abridge that dominion, cannot affect it; but is absolutely void. So the terms of this engagement import complete dominion; and this covenant cannot prevent that, but is absolutely void, as being repugnant to the interest; which is as large, having regard to the nature of the subject, as a fee: and the power of alienation therefore can no more be restrained in the one case than the other. In the case of Bankruptcy the Assignees must have a right to assign, independent of consent. The Assignee under an insolvent debtor's Act is in the same situation, bound to apply the property for the benefit of all the creditors. Admitting such cases as *Wilongham* v. *Joyce*, (a) now, notwithstanding some old cases, the Assignees can dispose of every species of interest in the Bankrupt; and restraint of alienation does not affect an assignee by Law. The Plaintiff is entitled by circuity at least, if not directly.

Mr. Alexander, and Mr. Owen, for the Defendants.—Supposing the argument correct in point of Law, that *Whitear* might, if he had a lease, have assigned, the Plaintiff is not entitled to a specific performance, which is always in the discretion of the Court, involving many circumstances beyond the consideration of the mere legal right; if he had a lease. The proviso is, that if the lessee shall let, set, assign, dispose of, or part with, in the most general terms,

(a) *Ante*, vol. . 168.

without license, the lease shall be void; with the addition of a covenant in one of the leases. A construction must be made, that will give effect to the whole instrument. *The fair effect is, that such assigns are intended, as upon the whole instrument the lessee might lawfully have: *viz.* assigns by license, or by law: assignments, which this general language cannot prevent. The effect as to the new lease must be the same. The Court will not grant a specific performance; if the act, being done, would amount to a forfeiture.

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The distinction between a purchase and a lease has been often acknowledged. In the case of a purchase, there is no conveyance without the money; and it is indifferent to the vendor from whom he receives it: but the relation of landlord and tenant continuing, there are many circumstances, which it is very important for the lessor to consider. There is no instance of a voluntary assignee by agreement prevailing upon the Court to grant a specific performance. The assignee may not understand the management of a farm, and may in other respects be such a person as the lessor would not have contracted with. Lord *Eldon* refused to act upon a suggestion of doubts as to the solvency of the lessee. (*a*) In a case (*b*) much stronger, and more directly applicable, Lord *Redesdale* took a very strong line: holding, that there should be no specific performance, except to the person with whom the agreement was made; putting it upon that ground merely, that the Plaintiff was not the person with whom the contract was made. He has always his remedy at law. In *Brooke* v. *Hewett* (*c*) there were many circumstances; and Lord *Rosslyn*, declining to decide such a question upon demurrer, said, a strong case must be made for relief at the hearing; and the case there cited, *Drake* v. *The Mayor of Exeter*, (*a*) is against such relief.

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Mr. Richards, *in Reply*.—The object of these restraints upon the power of assignment is, not to enable the lessor to extort a fine, but to give him the opportunity of approving of the tenant. The distinction of this case arises from the terms, that are used; declaring in effect, that the lessor does not look to the personal qualifications of the tenant: the limitation going to executors and administrators. The Plaintiff is entitled to a lease, unless it can be shown, that he is not a fit person to have it: but there is no suggestion, that he is not capable of performing the covenants, or that he is in any respect unfit.

(*a*) *Buckland* v. *Hall*, *ante*, vol. viii. 92. *Boardman* v. *Mostyn*, *ante*, vol. vi. 467.

(*b*) *O'Herlihy* v. *Hedges*, 1 *Sch. & Lef. Rep.* 123.

(*c*) *Ante*, vol. iii. 253.

(*a*) p. 510. 1 *Ch. Ca.* 71.

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The MASTER *of the* ROLLS.—According to the argument, used in the reply, there never was a good covenant against assigning. In a number of cases, that have occurred, the covenant has been shaped as this is, extending to executors and administrators.

I wish to consider a little further the latter part of the case, as to this circuitous equity: I have very little doubt upon the former.

July 30.

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The MASTER *of the* ROLLS.—In this case the objection to grant the lease arises chiefly upon the proviso against assignment. The Defendants say, if a lease had been executed to *Whitear*, he could not have assigned it without licence from them; and therefore he could not assign the benefit of this equitable agreement for a lease. The Plaintiff endeavours to repel that; insisting, first, that there is no valid provision against assignment; that the agreement is for a lease to *Whitear*, his executors, administrators, and assigns; and the proviso was repugnant. There is no more repugnance in this proviso, than in an estate to a man and his heirs, with a subsequent restriction to heirs of a particular description. The assigns must be understood to be such as upon the whole, taken together, the lessee may lawfully have: *viz.* assigns with license; and, upon looking into books of conveyancing, that appears to be the form, in which these leases are made: *viz.* to assigns; with a proviso, that neither the lessee nor his assigns shall assign without license.

It is then said, in the event there is an end of the proviso; for it does not extend to the legal assignment under the insolvent debtor's act, or under a Commission of Bankruptcy: the right therefore passes to the assignee under the insolvent debtor's act, but subject to the agreement with the Plaintiff. There is no such equity; and the Plaintiff cannot claim to have a lease made in his favour either through or against the assignees. It would be very doubtful, supposing Bankruptcy out of the question, whether *Whitear* himself could maintain a bill for a specific performance, after an act, amounting to a forfeiture of the lease, if a lease had been executed; having absolutely assigned, as far as he had any interest, without the license of the landlord. But, waiving that, what is the effect of an agreement to assign, where the lease is not assignable without license? If the landlord does not give the license, the agreement cannot be carried into execution. The lessee may subject himself to an action; but that is all. A Court of Equity cannot consider that as done, which, if done, would extinguish the very subject of the contract.

Whether a person, entitled under an agreement for a lease, to be void upon assignment without license, having assigned without license, can inforce a specific performance, *Query.*

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Then how does the Bankruptcy give operation and effect to this inefficient contract? The effect would be singular, that the Bankruptcy of the debtor should increase the value of the security; converting what was waste paper into a valid mortgage; and that against the Assignees a trust should arise, to which the lease was not liable in the hands of the Bankrupt. It is a great stretch to give to general Assignees what the Bankrupt himself could not have conveyed: but that stretch is made only in their favour, and for general creditors. In *Goring* v. *Warner* (a) that decision was made by Lord *Macclesfield* in opposition to the opinion of Sir *Joseph Jekyll*, and the tendency of all the old cases; and upon a strange ground; that the Statute supersedes the agreement. How can that be, if the agreement was legal? By saying, the Statute supersedes the agreement, Lord *Macclesfield* admitted, that the true meaning of the agreement was to exclude Assignees of all kinds; and that is determined to be legal; for by a slight variation of the phrase it is competent to a landlord to prevent the lease passing to legal Assignees. But that is determined; and it must be held, that, if there had been a lease, it would have passed to the general Assignees.

But that is determined in favour of general creditors only, not for particular assignees. The law interferes against the landlord for one purpose, not for another. There would be an inconsistency in saying, the purpose for which it does interpose, is not the purpose it was to answer: but that is another purpose; for which it would not interpose; that the reason it interposes is, that there were creditors: but then it interposes, not to satisfy them, but to execute a previous contract; into which the Bankrupt may have voluntarily entered. In *Doe ex dem. Mitchinson* v. *Carter*, (a) the distinction between voluntary acts, and those that pass *in invitum*, was adopted.

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The truth is, that the situation in which a lessee, restrained from assigning without license, is placed, is, that he can have assigns only of two sorts: either an assign approved by the landlord, or an assign by appointment or designation of law: whereas the argument in this case goes to this; that he may have an assign of his own appointment; and has only to get an Act of Bankruptcy committed, to give effect to his own assignment, in opposition to the landlord's right, and to his own legal assignment. That is impossible; for the effect is to set it up against his general Assignees.

Supposing, however, that this is wrong, still the question remains, whether in this case the Plaintiff is entitled to a specific performance of that, which rests only in agreement.

(a) 7 *Vin.* 85 2 *Eq. Ca Ab.* 100
(a) p. 513. 8 *Term Rep.* 57. 300

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First, he must maintain, that *Geering* himself could enforce a specific performance; which is very disputable. The proposition, that the Assignee of a Bankrupt can compel a landlord specifically to perform an agreement to grant a lease to the Bankrupt, has never been determined. The utmost extent of *Brooke* v. *Hewitt*, (*b*) is, that Lord *Rosslyn* would

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not say, it was impossible; acknowledging, that the Assignee would have great difficulty to establish it at the hearing. I should think that difficulty insurmountable. But there was no proviso against assignment What then would the Court say, where there is a proviso against assignment? Would the Court in direct opposition to that proviso execute such a covenant?

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(*b*) *Ante*, vol. III. 253

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